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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Richard Seeborg, Judge

INNOVATION LAW LAB; et al.,)	
)	
Plaintiffs,)	
)	
VS.)	NO. C 19-00807 RS
)	
KIRSTJEN NIELSEN, Secretary of)	
Homeland Security, in her)	
official capacity; et al.,)	
)	
Defendants.)	

San Francisco, California
Friday, March 22, 2019

TRANSCRIPT OF PROCEEDINGS

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Friday - March 22, 2019

9:34 a.m.

P R O C E E D I N G S

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THE CLERK: Calling case C 19-807, Innovation Law Lab versus Nielsen.

Counsel, please come forward and state your appearances.

MS. RABINOVITZ: Judy Rabinovitz for the plaintiffs.

THE COURT: Good morning.

MS. RABINOVITZ: Good morning.

MR. STEWART: Good morning, Your Honor. Scott Stewart on behalf of the United States. I'm joined by my colleague Erez Reuveni.

THE COURT: Good morning.

Any other appearances on the plaintiffs' side?

MR. GELERNT: Good morning, Your Honor. Lee Gelernt for plaintiffs.

THE COURT: Good morning.

MS. VEROFF: Good morning, Your Honor. Julie Veroff for plaintiffs.

THE COURT: Good morning.

MS. NEWELL: Good morning. Jennifer Chang Newell for plaintiffs.

THE COURT: Good morning.

MS. BOOKEY: Blaine Bokey for plaintiffs.

THE COURT: Good morning.

1 **MS. CROW:** Good morning, Your Honor. Melissa Crow for
2 the plaintiffs.

3 **THE COURT:** Good morning.

4 **MS. EILAND:** And, finally, good morning, Your Honor.
5 I'm Katrina Eiland for the plaintiffs.

6 **THE COURT:** Good morning. Everyone who is planning to
7 say anything has introduced themselves?

8 Okay. Let me make some preliminary comments, which I hope
9 are going to assist you in focusing the arguments this morning.

10 There are three principal motions that we're going to be
11 addressing: The motion to transfer to the Southern District of
12 California, the motion for preliminary injunction, and then the
13 motion to strike extra-record evidence or to admit depending
14 upon which party is making the motion. So those are what we
15 have on the table.

16 While I am not precluding discussion of certain of these
17 motions, I do want to go through some of them so that you know
18 where I would really like you to focus your attention and
19 issues where you've provided me with thorough briefing that I
20 have had an opportunity to spend time with.

21 And, again, you certainly are free to direct comments on
22 the motions that I'm going to be listing in a moment, but I do
23 want the principal time to be spent on some of the issues that
24 I'm going to talk about in a moment.

25 With respect to the motion to transfer to the Southern

1 District of California, I will tell you that having read the
2 papers, I don't think there's a basis to transfer this case to
3 San Diego. The nature of this case is such that there is no
4 particular district I think that is the obvious place for it to
5 be venued.

6 A 1404 transfer to San Diego simply because I think the
7 happenstance in some ways of the MPP policy has initially been
8 implemented through the port of entry in San Ysidro doesn't
9 mean that in a classic 1404 analysis that San Diego, Southern
10 District of California, has any particular connection to that.
11 We don't have witnesses resident there, we don't have materials
12 that are more likely to be found there, and we do have the fact
13 that several of the plaintiffs' organizations are resident in
14 this district.

15 Now, that is, I think, sufficient to trigger perhaps not
16 the full flow of deference to the plaintiffs' choice of forum
17 if there had been more of a connection here, but it's certainly
18 enough to provide for deference to that forum. I really just
19 don't think that there is -- one district is more obvious than
20 another in light of the nature of this case.

21 With respect to the preliminary injunction motion, the
22 issues of standing and justiciability are significant issues,
23 but I will say that I'm inclined to think -- on the standing
24 question, I've got some *amicus* briefing and some other briefing
25 that effectively is saying, well, the Ninth Circuit law is

1 wrong.

2 And I understand why parties make that argument when they
3 need to; but for my purposes, the Ninth Circuit law is never
4 wrong. It is the binding law. So if it's fairly clear that
5 the Ninth Circuit current law provides a particular avenue,
6 it's the avenue I'm going to take until the Ninth Circuit
7 decides that they want to take another avenue. And I think on
8 the standing question, certainly organizational standing, the
9 circuit has given me some pretty clear direction that there is
10 standing in this case.

11 And on the justiciability issue, I think that these are
12 justiciable questions. I don't think this is a case where
13 we're talking about a discretionary decision in a particular
14 case by an immigration official, which would not be reviewable,
15 but it really is going to the interaction between the expedited
16 removal provision and the contiguous territory return
17 provision, and whether or not certain conduct is violative of
18 the APA; and I think that that is appropriate for consideration
19 and, indeed, I think the Supreme Court case of this week in the
20 decision that they did make on that question, on the
21 justiciability question, is not contrary to that.

22 And then ticking off the list, I know there's a great deal
23 of material that's been provided about irreparable harm,
24 declarations that I've received. You certainly can address
25 those questions but, again, I don't think that is the focus of

1 where I would like to have our discussion today.

2 And, finally, on the list of items that I would say don't
3 need as much attention are really the questions of what is
4 extra-administrative record evidence or not. I mean, the
5 parties seem to effectively agree that I can consider
6 extra-record evidence when we're considering standing issues
7 and irreparable harm issues, but I can't consider the materials
8 with respect to the merits determination. It's the
9 administrative record on an APA review that is going to call
10 the question.

11 The dispute seems to be what is certain of these materials
12 being offered for in reality, and those questions I think I can
13 address through the briefing that you've provided so I'm not
14 particularly asking for discussion on that.

15 So that brings us to the subjects I do think we need to
16 spend some time on, and that is the proper statutory
17 interpretation of Section 1225, whether or not those to whom
18 the MPP is being applied are or are not subject to contiguous
19 territory return under the statute; and then the question with
20 respect to -- I'm probably going to pronounce this
21 incorrectly -- *refoulement*. Is that how it's pronounced? Does
22 anybody -- anyway, you-all know what it is. You know, as
23 that's codified in 1231, whether or not the procedures that are
24 contemplated in the MPP process are contrary to our
25 *non-refoulement* obligations as the subject of 1231 and then

1 also the 1967 protocols flowing from the 1950 agreements.

2 So those are the areas that I am principally interested in
3 hearing from the parties focus on. So that's a long intro, but
4 why don't we start with the moving party, whoever wants to
5 begin the discussion, and then we'll go from there.

6 **MS. RABINOVITZ:** Thank you, Your Honor.

7 So I'm going to start with the statute. As you were
8 saying, this has to do with 1225(b) and how it relates to the
9 contiguous territory provision 1225 -- well, there's 1225(b)(1)
10 and then there's 1225(b)(2)(C), which is the contiguous
11 territory provision.

12 **THE COURT:** Right.

13 **MS. RABINOVITZ:** So the basic thing when we look at
14 the contiguous territory provision is that it says that it
15 doesn't apply -- it only applies to people described in
16 paragraph (A) of 1225(b)(2), and (A) makes an exception for
17 people that are exempt under (A) or (B), and this is where we
18 come to the critical language because (B) says that those
19 people that are not subject to 1225(b)(2)(A) and, therefore,
20 not subject to the contiguous territory provision are aliens
21 who are subject -- let me just find this provision.

22 (Pause in proceedings.)

23 **MS. RABINOVITZ:** Exception, an alien to whom paragraph
24 (i) applies, which means 1225(b)(2)(i).

25 So really the issue --

1 **THE COURT:** You say it doesn't matter whether or not
2 it's actually been applied.

3 **MS. RABINOVITZ:** Right.

4 **THE COURT:** It's anyone who theoretically could be
5 subject to be expedited removal.

6 **MS. RABINOVITZ:** Yeah. We're basically saying that
7 the statute -- to whom the statute applies.

8 **THE COURT:** Let me ask you. Under your
9 interpretation, who would be subject to (C)? Who would be
10 subject to the contiguous removal provision?

11 **MS. RABINOVITZ:** Anybody who is not -- who is an
12 applicant for admission who doesn't fall under the expedited
13 removal provision.

14 **THE COURT:** I understand. Well, who are they? Who
15 are they?

16 **MS. RABINOVITZ:** Okay. So those are people who
17 arrive -- maybe I should start by saying the expedited removal
18 provision is a narrower provision that applies to applicants
19 for admission who are arriving in the United States --

20 **THE COURT:** Right.

21 **MS. RABINOVITZ:** -- and who lack documents or have
22 fraudulent documents.

23 **THE COURT:** Right.

24 **MS. RABINOVITZ:** There are many other reasons why
25 somebody could be an applicant for admission who's

1 inadmissible. They could be an individual who is inadmissible
2 for public charge grounds. They could be a person who's
3 inadmissible for criminal grounds. There's, like, 20, 30
4 different --

5 **THE COURT:** So it's only people -- because the focus
6 is on at the time that you are arriving, if you will, so it
7 wouldn't -- it doesn't involve people, for example, who
8 overstay a visa.

9 **MS. RABINOVITZ:** Actually, when you look at the
10 Section 1225(b)(2)(i) or 1225(b)(2), 1225(b)(2) does apply more
11 broadly to even people who have overstayed their visas and
12 are -- well, actually, not. Overstayed their visas, they've
13 been admitted --

14 **THE COURT:** That's my question.

15 **MS. RABINOVITZ:** -- but it does apply to people who
16 enter without inspection and have been here for years. Those
17 are not the arriving aliens, though, and they're not subject to
18 contiguous territory return.

19 So contiguous territory return is a subset of those who
20 are under 1225(b)(2). It's going to be those who are arriving
21 and who are subject, but they're different than 1225(b)(1)
22 because they're charged with inadmissibility on different
23 grounds than those who are subject to expedited removal.

24 And that's where I want to just cite the language from
25 *Jennings* where it says 1225(b)(1) and 1225(b)(2) authorize the

1 detention of certain aliens. Aliens covered by 1225 -- 1220 --
2 let me just look at the section. Section 1225 -- it says this,
3 sorry (reading):

4 "Applicants for admission fall into one of two
5 categories: Those covered by 1225(b)(1) and those covered
6 by 1225(b)(2). Section 1225(b)(1) applies to aliens
7 initially determined to be inadmissible due to fraud,
8 misrepresentation, or lack of valid documentation.
9 Section 1225(b)(2) is broader. It applies to all
10 applicants not covered by 1225(b)(1)."

11 And that's why I'm saying it's a broader group of people.
12 It could be someone, for example, who has a document, somebody
13 who has a green card but there's a question about whether
14 they've abandoned their residence, whether they have a
15 conviction that renders them now inadmissible. It could be
16 people who have commuter cards that are somehow or other being,
17 you know, questioned, but they're not people without documents
18 or fraudulent.

19 And you could even have somebody who is -- you know, if
20 DHS decides to charge somebody with any ground of
21 inadmissibility other than the two that make you subject to
22 1225(b)(2), then they're put into the other category.

23 **THE COURT:** Well, you know, I'm sure you know why I'm
24 asking the question. It's to try to understand. If I embraced
25 your interpretation, would it result in the reality that really

1 nobody is subject to (C)? And you're saying that's not true.

2 **MS. RABINOVITZ:** No, that's not the case.

3 **THE COURT:** Okay. Let me shift the question a bit.

4 As I understand your argument, you don't have any --
5 you're not disputing the right of DHS to exercise the
6 discretion to shift people into two and to have a full-fledged
7 1229(a) removal proceeding? You're not disputing that they can
8 do that?

9 **MS. RABINOVITZ:** Well, let me clarify, Your Honor.
10 We're not disputing that somebody who's in 1225(b)(1), they
11 could decide to put them into regular removal proceedings.

12 **THE COURT:** Right.

13 **MS. RABINOVITZ:** We don't think that puts them into
14 1225(b)(2) as long as there's someone who's --

15 **THE COURT:** No, I understand that --

16 **MS. RABINOVITZ:** Okay. But they can be put there.

17 **THE COURT:** -- but they can do it.

18 **MS. RABINOVITZ:** Right.

19 **THE COURT:** I mean, you're not saying, oh, you don't
20 have a right, if you're someone who (b)(1) could apply to, you,
21 the government, have no discretion to move that person into a
22 removal -- a normal, if you will, removal proceeding. You say
23 they can do that.

24 **MS. RABINOVITZ:** That's correct, Your Honor.

25 **THE COURT:** Right. You say if they do that, those

1 people carry with them the label, if you will, that they're
2 always (b) (1) people.

3 **MS. RABINOVITZ:** And they not only carry the label,
4 they are (b) (1) people because all that's happening is under
5 (b) (1), the government can put people into regular removal
6 proceedings. It's just created a screening that they have to
7 go through a credible fear screening first.

8 Essentially what the government can do is say, "We're
9 going to waive the screening and just put you into regular
10 removal proceedings." You're still someone who's described in
11 1225(b) (1) .

12 And essentially our argument is really a textual argument.
13 Congress when it created the contiguous territory provision and
14 did 1225(b) (2), it said there is an exception, and the
15 exception are individuals who fall under paragraph (1) so -- or
16 to whom paragraph (1) applies.

17 **THE COURT:** What would be the legislative intent
18 behind -- and maybe the premise is something you won't
19 necessarily agree with. It's a benefit in a sense, certainly
20 from your perspective, not to be subject to the (C) provision.
21 Why would the (b) (1) individuals, those who could potentially
22 be subject to expedited removal, why would they be the
23 benefiting group that they are excluded from eligibility for
24 (C)? Why would Congress want to do that?

25 **MS. RABINOVITZ:** Well, I can't really, you know,

1 answer that question except to say there's already a screening
2 in (b) (1). You know, so in some ways (b) (1) has a screening
3 that 12(b) (2) [sic] has instead a contiguous territory return
4 provision, which we also think should be subject to some kind
5 of screening. So it's not like you're saying -- if they want
6 to do a screening, they can do a screening under credible fear;
7 if they don't, then they can put them in regular removal
8 proceedings.

9 But I think the critical issue is that when Congress wrote
10 this statute, what does it mean to say it doesn't apply to
11 people to whom 1221 -- or it exempts people to whom 1221 --
12 1225(b) (1) applies? You know, that has to mean something. The
13 government says it means to whom they have applied it, but
14 that's not what it says. It says --

15 **THE COURT:** But isn't the government effectively
16 saying, "Well, if we exercise our discretion, which we have, to
17 put people into regular removal proceedings, that's potentially
18 going to take longer than expedited removal. For those people
19 we think, while that's going on because it's going to take
20 longer, they have to go back to the contiguous country from
21 which they came through and so there's a perfectly logical
22 reason why we say those individuals under the statutory scheme
23 should be subject to contiguous return, but the expedited
24 removal people because we're going to expedite the removal
25 process, they don't -- we won't be necessarily -- we won't be

1 removing them under the contiguous removal statute because
2 they're exempted"? Why doesn't that make sense?

3 **MS. RABINOVITZ:** It could in one way make sense, but
4 it's not -- first of all, it's not what Congress said, and
5 they've said that you're still under 1225 -- well, that they're
6 two separate provisions. If you look at it, 1225(b)(1) says
7 "inspection of certain aliens" and 1225(b)(2) says "inspection
8 of other aliens." They're two different categories.

9 The mere fact that they decide not to exercise their --
10 not to put somebody into expedited removal and to waive the
11 credible fear interview and just to put them into regular
12 removal proceedings doesn't move them from one bucket to the
13 other.

14 And one example would be, for example, if you're -- if you
15 could be subject to criminal charge for shoplifting and the
16 government decides to instead, "Oh, we're not going to
17 prosecute you for this," that doesn't mean that the shoplifting
18 statute doesn't apply to you. The shoplifting statute still
19 applies to you. It's just they've decided not to exercise
20 their -- not to prosecute you under it.

21 So in terms of why Congress might have thought this, you
22 know, they were -- I mean, the fact that Congress created --
23 you know, they decided to create this expedited system for
24 people who came without documents, but they also recognized
25 that many of those people who come without documents are asylum

1 seekers because that's just the reality. Asylum seekers don't
2 have documents. That's why they come -- and that's why they
3 come by land. If they had documents, they could fly here, they
4 could get tourist visas, whatever. So many of these people are
5 asylum seekers and, therefore, Congress was clear it set up a
6 threshold screening, a credible fear screening, which is a low
7 screening, to make sure that people would not -- who actually
8 do face persecution would not be erroneously returned.

9 So there is a concern for this group of people, and I
10 think that it doesn't quite make sense that they would have
11 that concern and then would say, "Oh, but you can be returned
12 to contiguous territory pursuant to a provision that the
13 government says has no constraints at all." Now, obviously we
14 disagree with them on that as well, but --

15 **THE COURT:** We'll get to those issues.

16 **MS. RABINOVITZ:** -- it just -- so I think that it is
17 consistent with the fact that Congress said "These are people
18 who are particularly vulnerable. We've recognized this by
19 making sure there's a credible fear screening." If the
20 government wants to get rid of the credible fear screening and
21 just put them into regular removal proceedings, fine, but it
22 shouldn't be able to use that as a way to circumvent the
23 protection.

24 Essentially the way that the government interprets this --

25 **THE COURT:** But, again, that goes back to this initial

1 question. If they have a -- if it's within their discretion to
2 move people into the regular removal process, to support your
3 argument, there would have to be some indication, some record
4 that it's being disingenuously employed; and I know you may
5 think it is, but where's -- I don't have that in the record.

6 So your argument right now is the statute --

7 **MS. RABINOVITZ:** Right.

8 **THE COURT:** -- if I read the statute, but I don't know
9 how you get beyond once you've answered the question that says
10 that they have discretion to move people into the removal
11 process. This idea that they for all time have the mark of
12 (b) (1) even when they're in regular removal is a tall order,
13 and I don't know where that is, you know, in the statute.

14 I mean, I understand you could perhaps develop some
15 argument at some point that says it's being implemented in an
16 entirely disingenuous fashion to end-run, just as you suggest;
17 but as far as I know, that's not the record that I have in
18 front of me.

19 **MS. RABINOVITZ:** Right, but I think that -- I mean,
20 even if you look at the language in *Jennings* and the way that
21 it construed the provision, it said people who were in
22 1225(b) (1) who then were given credible fears, were put into
23 regular removal proceedings, they were still in 1225(b) (1).
24 The fact that they were in --

25 **THE COURT:** Well, they still could have been in

1 1225(b)(1) but they're not anymore if they're in regular
2 removal.

3 **MS. RABINOVITZ:** No. Actually *Jennings* says that they
4 still are because we had argued that, no, they moved into a
5 different provision and they were governed by a different
6 statute; and the Supreme Court said, "No. They're still
7 governed by that statute while their asylum applications are
8 being considered. So they're still under 1225(b)(1)."

9 **THE COURT:** Well, that's while their asylum
10 application is being considered. In this instance, though,
11 it's sort of an alternative avenue; and once you go into
12 (b)(2), I'll go back and look, but you think *Jennings* says you
13 carry with you this (b)(1) concept?

14 **MS. RABINOVITZ:** It basically says you don't get out
15 of (b)(1).

16 **THE COURT:** Okay.

17 **MS. RABINOVITZ:** You don't get out of (b)(1).

18 **THE COURT:** I'll look into that.

19 **MS. RABINOVITZ:** Those people who pass credible fear
20 don't get out of (b)(1). They're still under (b)(1). So --

21 **THE COURT:** Let me shift the discussion a little and
22 go back to some basics here to make sure I understand what you
23 are basing your argument upon.

24 You have six claims for relief in your complaint, and
25 you're moving only on the APA claims on preliminary injunction,

1 as I understand it, the fifth claim for relief, which is just
2 the straight *refoulement* -- *non-refoulement* violation of
3 international law. That, you're not moving on.

4 **MS. RABINOVITZ:** Right.

5 **THE COURT:** So it's the five APA claims. But they're
6 different, the five APA claims. We've been talking about --
7 and this is where perhaps my first question should go -- what
8 we've just had a discussion about is really your, I think --

9 **MS. RABINOVITZ:** The first claim.

10 **THE COURT:** -- your first claim for relief.

11 **MS. RABINOVITZ:** And only a portion of it because we
12 made a broader claim for why the statute didn't apply.

13 **THE COURT:** Okay. And then you have, which we'll talk
14 about in a moment, you have the notice-and-comment issue; you
15 have an issue regarding *non-refoulement* under the APA, which
16 goes to effectively the procedures for determining whether or
17 not there is a fear of persecution/torture if returned to
18 Mexico; right?

19 **MS. RABINOVITZ:** Right.

20 **THE COURT:** And then you have a sixth claim, which is
21 sort of the whole process effectively deprives someone of their
22 right to apply for asylum.

23 **MS. RABINOVITZ:** Yeah. That is not part -- that's
24 not -- we're not moving on that.

25 **THE COURT:** Okay. That's why I wanted to make sure I

1 understand the ground rules of what you're arguing.

2 **MS. RABINOVITZ:** Yeah. What we're moving on is the
3 statutory argument that we were just discussing.

4 **THE COURT:** Yes.

5 **MS. RABINOVITZ:** The second argument I would say is
6 sort of a combination of an argument that the new procedure --
7 the new process that they've put in place to determine if
8 somebody has a fear and is eligible, that that violates the
9 withholding statute and is also arbitrary and capricious.

10 **THE COURT:** Right. And that argument, again just to
11 confirm my understanding, that argument is not dependent on the
12 statutory interpretation issue we've just discussed.

13 **MS. RABINOVITZ:** Right. Right.

14 And then our third argument is a notice-and-comment
15 argument, that they came up with this new process without
16 notice and comment and then it's a legislative rule and, you
17 know, also it changed from prior rules.

18 **THE COURT:** Yes. So let's --

19 **MS. RABINOVITZ:** And the last is just arbitrary and
20 capricious in general, that the MPP is arbitrary and capricious
21 because, you know, for a variety of reasons it doesn't really
22 serve the purposes that they said. They didn't actually -- the
23 evidence doesn't support it. They've distorted the evidence or
24 misunderstood the evidence. They haven't looked into certain
25 things that they should have looked into in terms of was this

1 really going to deter anybody and how is this going to affect
2 *bone fide* asylum seekers. So that's the fourth.

3 **THE COURT:** And those are all questions where I am
4 going to be -- everyone agrees I'm looking at the
5 administrative record.

6 **MS. RABINOVITZ:** Right, although I think what we
7 thought -- what we argued was that, yes, you're looking at the
8 administrative record but there's certain exceptions that we
9 think that -- look, we think you can decide for us by just
10 looking at the administrative record, but there's certain
11 things that we put in that we think fall within exceptions that
12 you can look at just for that purpose; and if you want me to
13 address that, I can now or I'll address it later.

14 **THE COURT:** No. As you know, because you cited it, I
15 just went through a variant on this theme with the census case.

16 **MS. RABINOVITZ:** Right.

17 **THE COURT:** Let me go back to basics and then I want
18 you to touch on a couple of the ones we've just addressed that
19 you haven't spoken of in any detail yet, and that is the
20 standard that I apply here.

21 We all know that in the Ninth Circuit we have the standard
22 which contemplates a bit of a sliding scale on irreparable harm
23 and substantial issues as opposed to the language of likelihood
24 of success on the merits; but in trying to apply that to this
25 case, that is a workable standard when you're -- the

1 substantial issues idea on the merits side is something that's
2 easy to grasp when you're talking about, well, the factual
3 record is likely to be developed as you go forward; but on what
4 we have now, even if there is a demonstration of substantial
5 likelihood of success on the merits, that's evident if there is
6 a strong showing of irreparable injury and there are
7 substantial questions that are raised, it's enough for
8 temporary injunctive relief and we go to the next step.

9 This case is more -- the questions that are presented for
10 decision on what we've all just talked about don't seem to be
11 really subject to further development particularly, and so I'm
12 wondering how you see the Ninth Circuit test being applied
13 here.

14 I mean, is there really for this case a difference between
15 looking to you as the plaintiffs to show likelihood of success
16 on the merits as opposed to substantial likelihood? Let's
17 assume you've made a compelling showing of irreparable harm.
18 How would kind of the reduced merits showing apply here?
19 "Reduced" is maybe the wrong word, but you know what I'm
20 getting at.

21 **MS. RABINOVITZ:** Yes. I would agree with you that for
22 our statutory claim --

23 **THE COURT:** Yeah.

24 **MS. RABINOVITZ:** -- I don't see that there's any
25 further development.

1 **THE COURT:** Okay. Well, I agree with you, yeah.

2 **MS. RABINOVITZ:** Okay. I don't think that's the case
3 with respect to our arbitrary and capricious claim or even
4 necessarily with respect to our notice-and-comment claim. I
5 mean, we're -- you know, there's a whole issue of whether the
6 administrative record is complete or whether there's other
7 stuff -- other material that should have been there that
8 explains, you know, they were contemplating, you know, rule
9 making. You know, four times they said they were contemplating
10 rule making and then they withdrew it. That isn't even in the
11 administrative record so we think that there may be more --

12 **THE COURT:** I see.

13 **MS. RABINOVITZ:** -- more documentation around that
14 that would -- when we complete the administrative record, that
15 would allow us -- I mean, we think that we -- you know, we have
16 a likelihood of success on the notice-and-comment claim as it
17 is now, but that's something that further development could
18 change it.

19 And same thing with the arbitrary and capricious general
20 argument because it does have to do with, you know,
21 completing -- determining whether the administrative record is
22 complete or whether there are other things that they should
23 have looked at that they didn't, and that's going to -- that's
24 not the moment that we're at right now.

25 **THE COURT:** Okay.

1 **MS. RABINOVITZ:** And I think that might -- you know,
2 might even be true -- I guess that that would even be true with
3 our arbitrary and capricious claim, the part of it that has to
4 do with the actual fear procedure, the *refoulement* procedure.
5 So to the extent that -- you know, one of our arguments for the
6 arbitrary and capricious claim is they don't even acknowledge a
7 departure from other procedures that they've used in the past.
8 They don't explain why they're not doing it. Maybe -- you
9 know, is there stuff in -- material in the -- you know, that we
10 could get that should have been in the administrative record
11 about this? I don't know.

12 But with respect to the statutory claim, there's nothing
13 else that we're going to do that I -- you know, to develop it.

14 **THE COURT:** Let's go back through the arguments you
15 haven't had a full opportunity to talk about, and that is what
16 you've just alluded to, the *non-refoulement* procedures, if you
17 will, and then also the notice-and-comment argument and the
18 other argument. So let's start with the arguments about the
19 process.

20 If I understand, and let me just make sure I understand
21 the process, an asylum officer or an immigration officer has a
22 discussion with the migrant and the migrant, first of all, has
23 to volunteer that there's some fear, and then there's an
24 interview; and then there's a decision and if the decision is
25 that, well, they're not convinced, then that's the end of the

1 process because there's no appeal.

2 So is that -- that's your understanding of how it works?

3 **MS. RABINOVITZ:** Right.

4 **THE COURT:** Okay. So tell me why that violates the
5 APA.

6 **MS. RABINOVITZ:** Okay. So, first of all, I want to
7 say that we have two arguments, one that it violates the
8 withholding statute and one that it's arbitrary and capricious.

9 The government takes the --

10 **THE COURT:** The withholding statute is 1231.

11 **MS. RABINOVITZ:** 1231, exactly, 1231(b)(3).

12 **THE COURT:** All right.

13 **MS. RABINOVITZ:** The government takes the position
14 that the withholding statute has absolutely no application to
15 the contiguous territory provision because they're two
16 provisions. The contiguous territory provision says nothing;
17 but bottom line, they concede, as they have to, that the
18 contiguous territory provision only applies to people who are
19 in 240 removal proceedings, and the right to apply for
20 withholding of removal attaches to anybody who is in --

21 **THE COURT:** Is this the argument that keys off of
22 "return" as opposed to "remove"?

23 **MS. RABINOVITZ:** Yeah.

24 **THE COURT:** Okay.

25 **MS. RABINOVITZ:** So the fact that this is a return

1 versus a removal, I mean, it keys off of that but on some level
2 it's irrelevant. I mean, I could go off on return, remove, I
3 mean, the bottom line is, you know, if you're returned to a
4 country where you're going to face persecution or torture, it
5 doesn't matter that you were returned versus removed. You're
6 going to face persecution or torture so there's no real
7 practical difference.

8 But even from a legal point of view, we're talking about
9 somebody who has a right to apply for this form of relief; and
10 at a very minimum, the contiguous territory provision has to be
11 interpreted in a way that doesn't eviscerate that right.

12 **THE COURT:** And under 1231, if you're going through a
13 removal proceeding, there is a procedural mechanism for this.

14 **MS. RABINOVITZ:** Right.

15 **THE COURT:** Is that the mechanism you think that
16 should be applied in this instance?

17 **MS. RABINOVITZ:** Well, that's a question, Your Honor.
18 I don't think we have to deal with it now because the procedure
19 is so completely off the charts of what they're doing. I mean,
20 if you were in regular removal proceedings, you'd have a
21 hearing, a full-blown hearing, before an immigration judge.
22 You'd be able to consult with counsel. You'd be able to
23 develop evidence. You'd be able to cross-examine witnesses.
24 Then if you lose, you'd be able to go to the Board of
25 Immigration Appeals.

1 All of this would happen and you'd be in the United States
2 and it wouldn't be -- it would extend over a period of months
3 if not longer. And then you would have to show -- ultimately
4 you'd have to meet this burden of showing it's more likely than
5 not that you would face persecution or torture.

6 What they have done, though, is to say "We're going to
7 require you to meet that same standard, you know, not in a
8 hearing before an immigration judge, not with an opportunity to
9 consult with counsel, not to obtain any evidence, not even with
10 notice that you're going to have to do this," and that somehow
11 or other that comports. I mean, they're just completely --
12 they're completely -- it's so extreme it's hard to imagine it
13 because they're imposing that same standard but with procedures
14 that are so deficient.

15 And one way to look at this is that there are other
16 procedures they've implemented in streamlined removal
17 proceedings -- whether it's expedited removal or reinstatement
18 of removal or, you know, administrative removal -- where you
19 don't get the full-blown withholding hearing but you get a
20 threshold screening. And what's so important is that threshold
21 screening does not require that you meet the full-blown
22 standard; it's that you show, you know, a significant
23 possibility that you'd be able to establish asylum or
24 withholding or a reasonable possibility. And not only is the
25 standard different, the procedures are better. You're allowed

1 to consult with counsel. If you have -- you have the interview
2 with the asylum officer, but then you can get review of that
3 decision by an immigration judge.

4 You know, so none of that is here, and so this is just so
5 patently off the charts that it just -- it can't comply with
6 the withholding statute, it can't -- it's arbitrary and
7 capricious because they haven't even acknowledged any of this.
8 It just doesn't serve its purpose.

9 I mean, if they say -- you know, if they say -- they
10 won't -- they won't -- they disagree that they actually have to
11 do anything. They say the statute doesn't require anything,
12 which again is -- we disagree with, but then they say "We're
13 going to implement it consistent with our *non-refoulement*
14 obligation." How this is consistent, it's not going -- I mean,
15 it's consistent if it actually prevents people from being
16 removed who could, you know, face torture or persecution.

17 But to give them an on-the-spot interview where they have
18 to prove the ultimate, you know, standard, virtually nobody can
19 pass this. And, you know, I mean I suppose that might be the
20 only other thing that further development of the record would
21 be interesting to know, has anyone passed it.

22 You know, I mean we already know they're not giving it to
23 that many people out of the number of people that they subject
24 to the return. It seems like it's a small fraction that they
25 even give the interview to. Because that's a whole other

1 issue, notice, whether you even are told. I mean, in the
2 credible fear context, they have to ask you if you have a fear
3 and tell you that you can express it. Here, people don't even
4 know that.

5 **THE COURT:** If a decision were to be rendered in your
6 favor on this question and perhaps not on the others, what
7 would the remedy be? It would be a remand to the agency,
8 wouldn't it? Because they could address these concerns.

9 **MS. RABINOVITZ:** Yeah. I mean, it would be enjoining
10 the policy until they come up with something that's --

11 **THE COURT:** Right.

12 **MS. RABINOVITZ:** -- that is legal.

13 **THE COURT:** Well, and just as a mechanical exercise,
14 is it a remand at that point? Is it an imposition of the
15 attempt of a preliminary injunction with a remand to the
16 agency, or is it just "You're enjoined and come back to us
17 someday if you come up with some new procedures"? Or how does
18 it work? Because the injunction is on the statutory
19 interpretation question. There isn't any repairing to be done
20 that's available.

21 **MS. RABINOVITZ:** Well, I suppose they could just --
22 they could change MPP and say "We're not going to apply it to
23 people who are -- to whom 235(b)(1) applies. We're going to
24 apply it to other people" because it still does apply to other
25 people.

1 But I don't really have an answer, Your Honor. I could
2 imagine you could go both ways. The main concern is that it be
3 enjoined, that they stop using an illegal process. And, yes,
4 they may be able to cure it by coming up with a process that
5 is -- that does comply with the withholding statute or does
6 comply with the *non-refoulement* obligation, but this isn't it.

7 **THE COURT:** Okay. So now let's go back to the
8 notice-and-comment issue and then also just -- well, you've
9 kind of covered the arbitrary and capricious argument, but
10 let's talk a little about notice and comment and whether or not
11 this is a legislative rule.

12 So your argument is grounded on the notion that the MPP
13 is -- the MPP in totality is a legislative rule?

14 **MS. RABINOVITZ:** No. We're not saying the MPP is a
15 legislative rule.

16 **THE COURT:** Okay. Tell me what you're --

17 **MS. RABINOVITZ:** MPP is discretionary. What is a
18 legislative rule is this process that they've developed, this
19 special -- I don't even know if I can call it a process, but
20 this -- the standard that they've set for determining whether
21 somebody is eligible or ineligible for MPP.

22 **THE COURT:** And is that the Secretary's January 25th
23 policy guidance for implementation of the MPP?

24 **MS. RABINOVITZ:** Right. Right.

25 **THE COURT:** And then there's another policy document

1 that I have here somewhere. And then there's the January 28th,
2 2019, guidance for implementing Section 235(b)(2)(C). Are
3 those the documents you say together constitute something
4 that --

5 **MS. RABINOVITZ:** I think so, Your Honor, but if I want
6 to be 100 percent sure, I should look at them.

7 **THE COURT:** All right.

8 (Pause in proceedings.)

9 **MS. RABINOVITZ:** But I would assume that you're
10 picking out the right ones.

11 The U.S. Citizenship and Immigration... Yeah, Guidance
12 for Implementing.

13 **THE COURT:** Okay.

14 **MS. RABINOVITZ:** Yeah, that's the one from
15 January 28th that's issued by CIS, and then -- which is the
16 other one you mentioned?

17 **THE COURT:** Well, there was one that was January 28th
18 and one that was January 25th.

19 **MS. RABINOVITZ:** Oh, January 25th.

20 **THE COURT:** One's from Secretary Nielsen and the other
21 one is --

22 **MS. RABINOVITZ:** Okay. The January 25th one also sets
23 out -- yes, I think it sets out the procedure and then says
24 there will be further guidance.

25 **THE COURT:** Yes.

1 **MS. RABINOVITZ:** Right.

2 **THE COURT:** And then the fact that you note, which was
3 that at various points in time there was some indication that
4 they were going the notice-and-comment route --

5 **MS. RABINOVITZ:** Right.

6 **THE COURT:** -- was that in conjunction with -- remind
7 me, was that the MPP? What were specifically what they were
8 indicating they were going to do in notice and comment?

9 **MS. RABINOVITZ:** It was about the implementation of
10 the contiguous territory return provision in a way that was
11 consistent with the statute.

12 **THE COURT:** Okay.

13 **MS. RABINOVITZ:** So that's all that it said. It
14 didn't give more specifics than that. You know, it just
15 followed from an Executive Order that had said "We're going to
16 start using the contiguous territory return provision"; and
17 then after, that every six months they would start -- that was
18 in early 2017 -- every six months they said "Okay. We're going
19 to make rules now to implement this to make sure that it's
20 implemented consistent."

21 **THE COURT:** Okay.

22 **MS. RABINOVITZ:** So our position is that this fear
23 determination mechanism that they've set up is a legislative
24 rule, and it's a legislative rule because it's not something
25 discretionary that somebody can choose whether to follow or not

1 to follow. It says this is what you do. This is what the
2 standard is. This is who you can decide is ineligible for MPP.
3 And so it's binding. It's not something that somebody can
4 choose to follow.

5 The government will explain what their position is, but
6 that doesn't matter because the MPP itself is discretionary and
7 the fact that this just says if you're eligible or not. Well,
8 that may be the case but this itself falls within the
9 definition of a legislative rule.

10 And I think that that's why we think it's subject to
11 notice and comment. There's also an argument that it's an
12 amendment of a legislative rule because it's creating a
13 procedure that's unlike any procedure they've had before.

14 When CAT was -- the CAT treaty was implemented in
15 regulations after FARA was enacted, you know, they then
16 promulgated regulations to meet that obligation and they're
17 regulations that are part of the withholding statute, that are
18 part of reinstatement, whatever, that, you know, create a
19 reasonable fear procedure in certain contexts.

20 But here, this is a new procedure. They're saying -- now,
21 they're saying, "Well, we're not really implementing it. We're
22 not -- we're just doing it because we want to." But it's a new
23 mechanism that's completely unlike any other mechanism they've
24 had before, and that would be another thing that would -- I
25 mean, that -- they went through rule making before for that.

1 That's one argument.

2 There's also the argument that with respect to the
3 contiguous territory return provision itself, there is a reg
4 that they have in place, which doesn't say anything about a
5 fear determination mechanism; and if they're amending it now to
6 create a fear determination mechanism, they need to go through
7 rule making. So that's what our argument is there.

8 **THE COURT:** The final set of questions before I'll
9 give the government a chance, then obviously give you a chance
10 to get back again and respond to what they have to say.

11 On this issue of national scope of injunction, the law is
12 evolving in each of the circuits on that question, what is --
13 you know, one, the government would say "Don't issue any
14 injunctive relief; but if you issue injunctive relief, limit it
15 to the 11 individuals that we're talking about and the
16 organizations we're talking about here and don't go beyond
17 that. And in different parts of the country, if this is
18 implemented, they go to their courts and they get an injunction
19 if it's appropriate."

20 What is it about this that would warrant the national --
21 why is the record sufficient for a sole little District Court
22 in one district out of the 94 to issue a national injunction?

23 **MS. RABINOVITZ:** Well, I think that the standard is
24 whether you need to be able to issue relief that is meaningful
25 for the plaintiffs. Now, it may be that for the individual

1 plaintiffs you could just give them relief, but we've got
2 organizational plaintiffs here whose missions are being
3 affected, you know, have a lot at stake because of this new
4 policy.

5 And I don't know how you would craft a limited injunction
6 that would protect them. You can't craft it, you know, in
7 terms of just their current plaintiffs because it's forward
8 looking. They're looking at their future. Are they going to
9 be able to survive or are all their clients going to be stuck
10 in Mexico and they're going to have to move to Mexico, which
11 unfortunately isn't really possible for most of them?

12 And geographically you can't limit it because their
13 clients come -- they're all different places along the border,
14 not just --

15 **THE COURT:** And I assume that I can assume just
16 uniform application of -- whatever procedures are being
17 utilized here, it's uniformly applied.

18 **MS. RABINOVITZ:** Yeah. I mean, to be fair, they just
19 started -- they started it in San Ysidro. Now they're
20 expanding it, and I understand they're expanding it today to
21 El Paso. I'm not sure exactly.

22 **THE COURT:** Eagle Pass or whatever.

23 **MS. RABINOVITZ:** We keep on hearing different things,
24 that it has been expanded or will be expanded, but it is being
25 expanded. We do know that it has been expanded to certain

1 places. And they've made it clear that their goal is to really
2 use this on a very, very large unprecedented level, which is
3 why we feel a preliminary injunction obviously is so necessary
4 because, you know, we think that it needs to be stopped in its
5 tracks before it, you know, gets even greater.

6 **THE COURT:** Is this issue before any other court?
7 Many of these cases, as you know, you know, there will be
8 cases -- at least overlapping cases in several different
9 districts. Are there any similar ones?

10 **MS. RABINOVITZ:** No. There are no other cases.

11 **THE COURT:** Okay.

12 **MS. RABINOVITZ:** I know that you weren't asking me to
13 address this, but I do just want to do it for a minute. In
14 terms of the arbitrary and capricious argument, I did address
15 it to some extent in terms of the fear determination mechanism,
16 but there's a broader -- we do have a broader arbitrary and
17 capricious argument about the whole MPP or forced return
18 policy, and that is just the one that looks at the same kinds
19 of things that you would look at in any case to determine
20 whether something is arbitrary and capricious.

21 You know, what are the Government's reasons? Is there
22 support for the Government's reason? Is it based on -- you
23 know, is it based on reliance on facts that really are there in
24 the record? Have they failed to look at certain things? Does
25 it really serve the policy -- the purposes they say? And we

1 think on all of those things, even without considering the
2 extra-record evidence, they can't -- you know, it's arbitrary
3 and capricious.

4 And just to give an example, you know, there is a lot of
5 evidence out there that people migrate to the United States not
6 because of what the U.S. laws are, and this has come up in case
7 after case against the government. So it's not something new
8 that they -- they don't need the declaration from Cecilia
9 Menjivar that we have to know this. I mean, her declaration
10 was part of the *RALR* case that we litigated, as was somebody
11 else's declaration, another migration expert's was there, and
12 there's been other cases where this has come up.

13 There are many, many migration studies -- studies about
14 migration that say: You can detain people. You can do this.
15 You can do this. You can do this. People make migration
16 decisions because of what they're facing in their home
17 countries, and that's why they come and they're going to keep
18 coming.

19 So for them to say one more thing, "Okay. We tried
20 detention. We tried criminal prosecution. We tried separating
21 families. We tried the asylum ban. Well, now, we're going to
22 try this, we're just going to keep them out and that will stop
23 them from coming," well, they at least have an obligation as
24 part of -- you know, they're making this policy to look and
25 consider is it going to have that effect or are they just

1 imposing misery on people for no effect.

2 **THE COURT:** Well, what do you understand to be the
3 policy? How is -- what's your understanding of what the
4 government articulates is the policy that's being furthered by
5 the MPP?

6 **MS. RABINOVITZ:** They say that the policy is to
7 deter -- I mean, is to deter fraudulent asylum claims, to
8 prevent people from absconding. I mean, we think, first of
9 all, that the evidence that's -- you know, that they base this
10 on about, like, nine out of ten asylum claims are denied,
11 that's patently wrong, but also the notion that all of these
12 asylum claims are fraudulent we also think is wrong. The
13 figures that they rely on for absconsion, you know,
14 unfortunately the declaration that we have, you can't --

15 **THE COURT:** When we're at that point in the process
16 of, well, we don't think they have the better argument that
17 it's going to further the policy goal of reducing absconding,
18 they've articulated that as one of the reasons that supports
19 the policy, aren't we then in the position that it's not
20 whether or not I think that's a good idea or not or I think
21 it's going to be a policy that's going to work or not, it's
22 they've articulated a policy; and as long as they --

23 **MS. RABINOVITZ:** Right.

24 **THE COURT:** -- have a basis for making that argument,
25 even if I think they're profoundly wrong, that's not for me to

1 say; right?

2 **MS. RABINOVITZ:** Definitely, Your Honor.

3 **THE COURT:** Okay.

4 **MS. RABINOVITZ:** But I think that there are things,
5 like, if they don't look at certain things, if they haven't
6 looked at is this really going to have a deterrent effect, is
7 this really -- you know, then -- you know --

8 **THE COURT:** I mean, for example, you're not saying
9 that it's an improper policy objective to try to reduce
10 absconding?

11 **MS. RABINOVITZ:** No.

12 **THE COURT:** You're not suggesting that it's, you know,
13 for --

14 **MS. RABINOVITZ:** No.

15 **THE COURT:** Okay. And even the policy objective of
16 disincentivizing efforts to migrate to the United States, is
17 that an improper --

18 **MS. RABINOVITZ:** No.

19 **THE COURT:** It may be a policy you profoundly disagree
20 with, but it's not an improper decision on the Administration's
21 or the political branch's --

22 **MS. RABINOVITZ:** I think it's not improper to say "We
23 want to disincentivize people from coming here illegally and
24 raising fraudulent claims." I think I would take issue with
25 whether it's legitimate to say "We're going to try to deter

1 *bone fide* asylum seekers from coming here."

2 **THE COURT:** Yes. Yes.

3 **MS. RABINOVITZ:** And one thing that they don't look at
4 here, the other thing in addition to the deterrence part, you
5 know, whether this is actually going to have a deterrent
6 effect, and I'm just saying they need to look at it. I'm not
7 saying that -- you know, that they -- you know, that they end
8 up having to come to the same conclusion, but they have to look
9 at it, you know, take it seriously. They've adopted this
10 policy which is affecting a lot of people. They say it's an
11 unprecedented policy. You know, you want to see what the
12 effect is going to be.

13 And the other effect they need to see is what's going to
14 be the effect on *bone fide* asylum seekers who are returned to
15 Mexico. They say that one of -- you know, this is where
16 there's sort of kind of a tension. They say that one of the
17 interests in addition to deterring fraudulent claims and
18 deterring absconsion is to assist legitimate asylum seekers.
19 Well, I don't know how this policy assists legitimate asylum
20 seekers.

21 You know, and the government knows the conditions in
22 Mexico are bad. I mean, it's not unexpected that having people
23 in Mexico have to show up for a hearing in the states is going
24 to be, you know, somewhat chaotic. I mean, how are they going
25 to get counsel?

1 The lists of attorneys that they send to them are
2 attorneys in the United States. You know, people can't access
3 those attorneys from Mexico. I mean, people we spoke to said,
4 "We tried calling the list and they said come here, come to
5 California." I mean, some of our plaintiff organizations have
6 gotten calls, you know, plaintiff organizations in
7 San Francisco, from somebody in Mexico. Well, what are they
8 supposed to do? They have to go to Mexico.

9 But, anyway, they haven't looked at -- even though it
10 doesn't require any extra-record evidence to do this, they
11 haven't looked at it, what -- you know, considered how is this
12 going to affect *bone fide* asylum seekers both to return them to
13 danger, you know, which they know it's a dangerous situation,
14 there's plenty of stuff in -- material in their administrative
15 record that shows that, and they didn't object to this Mexico
16 country report that -- you know, that the -- the State
17 Department report that says migrants -- you know, human rights
18 abuses against -- you know, this is one of the biggest -- one
19 of the main human rights issues in Mexico is the treatment of
20 migrants. So they know this. So to not look at what the
21 effect of the policy is going to be and, yet, they're thinking
22 of doing this on a major scale? So there's that.

23 Then there's the question of, you know, in terms of even
24 if the purpose is to single out those people who have -- you
25 know, to deter fraudulent asylum claims and people who abscond,

1 the people who are being returned, they're not screening them
2 to see if they have fraudulent asylum claims. They're not
3 looking at them to see whether they're people who would be
4 likely to abscond. They're just sending them back, and that
5 starts to seem like a Judalon-type thing of, like, what kind of
6 criteria, you know, are they doing.

7 So while some of these goals might be legitimate, the
8 policy, you know, itself isn't. And then there's also certain
9 goals that I don't think are legitimate when they've come out
10 and said, "You know, we need to do this because there are, you
11 know, misguided court decisions and outdated laws, and these
12 are creating these results and so we've got to do this." Well,
13 I don't think that's legitimate.

14 **THE COURT:** Yes, although I think in fairness to the
15 government when I went back and looked at that, I think that
16 they were saying that the misguided laws and the aberrant court
17 decisions, and the like, have created what they characterize as
18 the crisis, which is then addressed by -- they're not saying
19 that the reason for the MPP is they're trying to get around
20 misguided court opinions and laws or what have you. I think
21 they were saying that's what's created the problem they say
22 they have to address through this process.

23 In fairness to them, I mean, I don't -- yeah.

24 **MS. RABINOVITZ:** Well, you're fairer than I am.

25 (Laughter)

1 **THE COURT:** All right. On that note, let me hear from
2 Mr. Stewart, and then I'll have you come back up,
3 Ms. Rabinovitz, and we'll go from there.

4 **MS. RABINOVITZ:** All right.

5 **MR. STEWART:** Thank you, Your Honor. I'll follow your
6 lead and focus on a number of the legal issues that Your Honor
7 highlighted in this case.

8 For the reasons stated in our briefing, the Migration
9 Protection Protocols guidance is a lawful exercise of DHS's
10 discretionary and broad authority.

11 I think Your Honor described very well the way
12 Section 1225 works here. Somebody who falls into the
13 possibility of getting a full removal proceeding, if they also
14 meet the criteria to go into expedited removal, that means that
15 they're not necessarily -- that they're not fully -- or
16 automatically entitled to a full removal proceeding but they
17 can go either way. The decision is one left to discretion.

18 It's conceded in paragraph 73 of the complaint and in the
19 ERM or the Immigration Appeals decision, other decisions, it's
20 well understood that this is a discretionary decision because
21 somebody who falls both under Section 1225(b)(2)(A) but also
22 under Section 1225(b)(1) can have both provisions potentially
23 apply, and it's a question of which track the Department of
24 Homeland Security --

25 **THE COURT:** What is the policy reason why someone who

1 the government has elected to go the (b)(2) route and,
2 therefore, under your analysis is subject to the contiguous
3 removal provision, why are those migrants -- from a policy
4 perspective, what's -- what's the -- or perhaps I should say
5 from the sort of legislative intent perspective, why should
6 they be removed to Mexico or returned, in your word, as opposed
7 to those who are going through expedited removal?

8 Because we all agree if you're in (b)(1) -- I don't think
9 anybody's saying the statute provides that you're exempted out
10 of (C); right?

11 **MR. STEWART:** Right. Right.

12 **THE COURT:** So we're talking about the cohort of
13 migrants who you have decided are going into (b)(2). Why
14 should they -- just from an intent -- legislative intent
15 purpose, why are they subject to going back to Mexico while the
16 people in expedited removal aren't going back to Mexico?

17 **MR. STEWART:** Sure, Your Honor. I think you might
18 have identified this yourself earlier when you recognized that
19 the thought behind expedited removal by its name is that it
20 will be a fast process. Somebody will be screened. If they
21 don't have a credible fear, and if they -- that isn't changed
22 upon administrative review.

23 **THE COURT:** Well, from the government's perspective,
24 the fact that the (b)(1) people aren't subject to contiguous
25 return is not sort of a benefit being bestowed on them. It's

1 that they're going to be processed more quickly. So just from
2 a practical standpoint, you don't need (C) anymore.

3 **MR. STEWART:** That's right, Your Honor. And I'd
4 emphasize the hope and desire of folks who go into the (b)(1)
5 process, they're trying to get into full removal proceedings.
6 So it's really a screening mechanism where if somebody --

7 **THE COURT:** Although then they are subject -- I mean,
8 I'm not saying this is wrong, but if they succeed and they get
9 into (b)(2), then they may -- then they may be told "But now
10 you're going back to Mexico right now. Even though you've come
11 from another country, you're going back to Mexico because
12 you're no longer an expedited removal anymore so now you're
13 subject to the contiguous return."

14 **MR. STEWART:** Not under the guidance currently stated,
15 Your Honor. I think the guidance lays out that if somebody
16 goes from expedited removal into full removal, if that's how
17 they go into full removal proceedings, it's not going to be --
18 the MPP is not going to be applied to them.

19 Because the issue hasn't been squarely joined, I'd prefer
20 to table how that might shake out with a plaintiff who finds
21 him or herself in that position; but the guidance does say,
22 "You know, look, if you go from expedite -- if you have -- if
23 you have Section 1225(b)(1), that process applied to it, you're
24 subjected to it and you go into full removal proceedings."

25 From there you won't be subject to the --

1 **THE COURT:** Well, remind me. These 11 plaintiffs,
2 individual plaintiffs, were they determined to be -- they were
3 going into full removal proceedings.

4 **MR. STEWART:** Right. They were --

5 **THE COURT:** Right. And once they were -- that
6 determination was made, then the MPP was applied to them and
7 they were returned to Mexico?

8 **MR. STEWART:** Correct, Your Honor. Correct.

9 So I think that's sort of, I think, the logic behind the
10 system, Your Honor, and it's one that makes sense.

11 The 1225(b)(2)(C) was enacted in response to the BIA's
12 *Sanchez Avila* decision where the BIA said, "Look, this return
13 to territory mechanism makes sense. You could have a system
14 where people are coming into the United States. They're
15 overloading the system. They're straining the detention
16 resources and there are good policy reasons for returning them
17 to contiguous territory, but we're just not seeing the
18 statutory authority here."

19 Congress responded, it's responded with 1222(b)(2)(C), and
20 it was clearly in response to fill that gap and say, "Look,
21 this is what we're doing here. People who are placed into full
22 removal proceedings can indeed be returned and stay there
23 pending their removal proceedings."

24 So I think that's kind of the statutory logic here,
25 Your Honor. And although the plaintiffs have been quite clear,

1 particularly on pages 2 and 3 of their transfer motion, that
2 they see this as a facial challenge, I will say since the
3 plaintiffs have pointed to other events, my understanding is
4 that so far of the 11 plaintiffs who have had this applied to
5 them, I believe all are represented by counsel. I think 10
6 have appeared for proceedings. One got a continuance. Only
7 five of the 10 have expressed a fear so they go through the MPP
8 effort to claim a fear process. Five have evidently not
9 expressed such a fear, so they have not claimed that.

10 So this process is moving along. It's something that --
11 there will be occasional hiccups and things to work out
12 certainly, but it's going. It's underway. The Department of
13 Homeland Security made an effort to roll this out in a
14 deliberate way and -- sort of stepwise and, anyway, it's
15 underway and I think it's going as Congress envisioned in the
16 statutory text; and consistent with the text, with background
17 principles of prosecutorial discretion, with the plaintiffs'
18 concessions, and with Board of Immigration Appeals decisions,
19 this is a statutory -- statutorily authorized process.

20 If I can hit the various *non-refoulement* points that my
21 friends raise, Your Honor. We've explained why the provisions
22 at issue here, Section 1231, provisions regarding CAT
23 implementation, they by their terms apply to removal. They
24 don't apply to return.

25 **THE COURT:** Okay. Let's talk about that. I'm having

1 trouble following the distinction you're drawing between
2 "return" and "removal." I mean, certainly from the perspective
3 of the migrant, it doesn't make any difference whether or not
4 they're saying, "Oh, your label is you're being returned.
5 You're not being removed."

6 I mean, why -- there's historical back and forth on how
7 the term developed and we can or cannot go into that if you
8 think it's helpful, but just from the standpoint of why there's
9 a distinction, why should there be a distinction?

10 I mean, the same thing is happening to these people for
11 good or for bad. They're having (C) apply and they're going
12 back to Mexico. So I don't see why issues of your -- if you
13 have a legitimate fear of torture and issues that are
14 contemplated there, why it would make any difference whether or
15 not the designation under which you've gone to Mexico is return
16 or removal.

17 **MR. STEWART:** Sure, Your Honor. Here's the reason:
18 The MPP is not being applied to Mexican nationals. We're
19 talking about really folks from the Northern Triangle
20 countries.

21 **THE COURT:** Right.

22 **MR. STEWART:** And what -- withholding of removal,
23 whether statutory or under the regulations implemented in the
24 Convention Against Torture, it's about preventing you from
25 being returned to a particular country where you've articulated

1 a fear.

2 So these are third-country nationals. They're not Mexican
3 nationals. And by its terms, when people go through removal
4 proceedings and they have a final removal order and they seek
5 to have the removal withheld, it's country specific, "I don't
6 want to go back to Guatemala."

7 **THE COURT:** Sure.

8 **MR. STEWART:** So it's a distinction that -- it's
9 really a textual distinction. It's a sensible distinction.

10 **THE COURT:** But is it sensible? I mean, the concept
11 as it's been embraced in 1231 and other places is the concern
12 about returning a migrant -- return or remove, or what have
13 you -- to a place where they have a legitimate fear of
14 persecution, torture, et cetera.

15 And I agree with you that there are different ways in
16 which that can manifest. You're either going back to the
17 country from which you came; or, in this instance, because of
18 the way (C) is phrased, you're going to a country that isn't
19 your original country but it's a country that perhaps have --
20 you have legitimate concerns. Why should it make any
21 difference? I mean, isn't what that concept is trying to get
22 at is don't send someone to a place where they can establish
23 they have a legitimate fear of persecution, torture, and the
24 like?

25 Why does it matter if it's the country from which they

1 initially sought to leave or -- I mean, I just don't understand
2 the policy reason why we would draw that distinction.

3 **MR. STEWART:** Sure, Your Honor. It may be something
4 that Congress could have decided to do differently. Congress
5 has been very clear, however, that there is a distinction
6 between return and removal.

7 And there's a logic to why return might be different in
8 kind.

9 **THE COURT:** Well, that's what I'm trying to
10 understand.

11 **MR. STEWART:** Sure, Your Honor.

12 **THE COURT:** What is the logic?

13 **MR. STEWART:** I think Congress could have -- there's
14 not a great -- the statute does not go on and on about this by
15 any means, and I don't believe there's a great deal of history
16 elucidating it; but Congress could have believed, "Look, our
17 relationships with our contiguous neighbors are different in
18 kind from people who are farther from us. We have a little bit
19 more -- we have a snuggler relationship, a little bit more
20 control, a little bit more, like, 'Hey, neighboring government,
21 we need to address this issue.'"

22 So Congress could have thought, "Look, we have a different
23 in kind situation where we're not going to see the dangers in
24 our contiguous neighbors or we can control them or we can find
25 ways to deal with them or we have a better sense of them, those

1 kinds of things, where they might not -- that might not be
2 readily available with farther countries where we just don't
3 have the snug, neighborly relationship.

4 **THE COURT:** Well, wouldn't the way to address that is
5 that would manifest itself in the decisions that are made once
6 the process is applied on whether or not you say, "No, I don't
7 think that is a legitimate fear because of an understanding of
8 the situation in Mexico, which may be more refined than an
9 understanding of a situation in another country"? So the
10 distinction or the concern you're drawing is one that would
11 then be addressed if the process is applied.

12 The concern that the plaintiffs have is, as I understand
13 it, there is no mechanism to even assess that at the moment.
14 There's no opportunity for the migrant who is potentially going
15 to be subject to the subsection (C) removal to have their
16 opportunity, as they would in a 1231 removal process, to go
17 through and determine whether or not they have a legitimate
18 fear or not.

19 **MR. STEWART:** There is a process, Your Honor. This is
20 pages 2273 to '74 of the administrative record. That's part of
21 the guidance that USCIS put out on how we're going to do these
22 interviews, how we're going to find out whether somebody can be
23 returned to Mexico.

24 So I guess before I hit and squarely answer your point,
25 Your Honor, if I can hit -- as a preliminary matter, I would

1 emphasize that some may question the decision Congress made but
2 it treated return and removal as different in kind. Plaintiffs
3 have not challenged that as somehow an illegitimate decision
4 that Congress was not entitled to make, but that's a
5 preliminary point.

6 Two, that's a significant --

7 **THE COURT:** I think their argument would be that
8 that's just not -- they don't think that's right, that Congress
9 didn't treat it differently; that when they go through the
10 historical development of the use of these terms, that at the
11 end of the day you'll find there isn't that distinction.

12 So I think their principal argument is not that Congress
13 has made a mistake or is not entitled to treat these things
14 differently. I think they're saying they didn't treat them
15 differently at the end of the day.

16 **MR. STEWART:** That's correct. They have not made that
17 further argument that I was saying, Your Honor, but what I am
18 saying is -- what I'm emphasizing is that when Congress uses
19 "return" in one way and, you know, doesn't impose the same kind
20 of penalties on people who are moved into Mexico by return
21 versus people -- or people who are returned versus removed to
22 Mexico, the Supreme Court has been very clear that those
23 important distinctions in language matter and they reflect
24 congressional decisions to do differently.

25 Secondly -- and then I will get right to your point,

1 Your Honor -- Congress' choices really matters here, because
2 whatever the customary international law obligations are, when
3 there's a statute on point, we need to look to Congress to see
4 the extent to which those are embodied and enforceable in law.
5 That's quite important here.

6 But, third -- and this is what I was about to get to in
7 response to Your Honor's question about the guidance -- is that
8 even if you don't agree with us on the return-removal
9 distinction, even if you don't agree with that piece, the MPP
10 interview and guidance here does satisfy any international
11 obligation that could apply.

12 As I've said, this is at 2273 to 2274. In particular, it
13 talks about the hearing is nonadversarial. They need to make
14 sure the alien understands. Page 1 of the administrative
15 record says, "Look, somebody can raise a fear claim at any
16 point, and at that point they're going to be referred and
17 they'll be able to do this." So it's not just, like, they go
18 in there and then they're told later they'll return to Mexico
19 and they can't say anything about that. They can say something
20 about that and the process will go and they'll have a chance to
21 make that claim, and that's been well guarded for.

22 It's not the procedure that the -- that my friends in this
23 case want, but it is consistent with the obligation -- any
24 obligation that could apply here not to return somebody to a
25 territory where they face life or torture.

1 Now, as I emphasize, Your Honor, again, the plaintiffs in
2 this case, they're showing up at their hearings. Only about --
3 from my understanding is only five of ten so far have actually
4 claimed a fear in Mexico. That can be -- that can be dealt
5 with. The officers here, the guidance says, "Look, you know,
6 consider somebody's circumstances. You know, see, like, what
7 is somebody going to be facing in Mexico. Can they go to one
8 region that's going to be a problem for them versus another?"
9 So there's an effort here to make sure that any obligation that
10 needs to be satisfied is satisfied.

11 If I can move to a couple other merits points, Your Honor.
12 The APA, the procedural requirements and the reasonable
13 requirements are surely satisfied in this case. The
14 reasonableness requirements, I think Your Honor articulated
15 this and I believe even my friend articulated the theory behind
16 a lot of what's going on here. It's that due to various
17 constraints and difficulties in enforcing the immigration laws
18 and detaining and having capacity and having resources, there's
19 been a huge strain on the asylum system.

20 And the Secretary reasonably looked at the situation and
21 said, "Look, we have this problem here where it's not a good
22 calibration of incentives. Somebody is being told by
23 smugglers, by whoever else, that you can come across the border
24 as a family unit. It almost certainly guarantees release.
25 Even if you don't have any realistic possibility of getting

1 asylum, you can still get release into the country for years
2 even if you don't show up at your hearings, even if you don't
3 apply for them." AR 48 to 49 lays this out well including the
4 kind of -- the approach taken to see this problem.

5 **THE COURT:** So the justification is -- or the policy
6 reason for this is the absconding concern?

7 **MR. STEWART:** I'd put it a little broader. Absconding
8 is a big deal, Your Honor. I think it's -- a central reason
9 for this is to deter baseless asylum claims that lead to an
10 overtaking of detention capacity and overtaking of the
11 immigration asylum system.

12 We have I'm going to say 800,000 -- but I believe it's
13 more by now, Your Honor -- 800,000-case backlog in our
14 administrative immigration courts. And the Secretary said,
15 "Look, this is not tenable especially when we look at the
16 numbers of folks from Northern Triangle countries when it looks
17 like ultimately when they begin credible fear proceedings, only
18 about 17 percent in FY 2018 even got asylum, more than half
19 didn't show up or didn't even apply for asylum. They absconded
20 into the interior. We don't have the resources" --

21 **THE COURT:** Is this all in the administrative record?
22 All the justifications that you've just gone over, they're all
23 contained in there?

24 **MR. STEWART:** They are, Your Honor, and I believe at
25 pages 48 to 49 --

1 **THE COURT:** Okay.

2 **MR. STEWART:** -- I think almost all of that is.

3 That's an asylum interim final rule that lays out kind of all
4 these issues, but that's a good -- we cite --

5 **THE COURT:** Is that where I look for effectively your
6 answer to their argument that there is -- this kind of merges
7 into their arbitrary and capricious argument -- that there is
8 just an insufficient basis for, even accepting the
9 justification that you've articulated, that there just -- the
10 record is not sufficient to show that the department looked
11 into -- has a basis of support that would go to those
12 justifications?

13 **MR. STEWART:** Right, Your Honor. I'd fault -- let me
14 identify two faults in what I think -- I'd attribute to
15 their -- just -- I could give others, but I'd say one of the
16 faults is that -- I mean, aside from using a different
17 methodology, I mean, take their number of, you know, only -- or
18 87.5 percent of people show up for their immigration
19 proceedings. The absconsion rate is not as high as the
20 government states. Even taking that as true, that's one out of
21 eight people who isn't showing up.

22 When you have 2,000 people arriving daily at the border,
23 that's a lot of folks, Your Honor, and that's, you know, cases
24 piling up in the system, resources are being put to them,
25 people are lost in the interior. But we've explained that the

1 numbers are actually a lot worse than that.

2 Second, Your Honor, a lot of plaintiffs' arguments focus
3 on this idea, like, look, this won't deter lawful migration --
4 or this won't deter migration from the Northern Triangle
5 because people are really afraid of the conditions there. It's
6 very bad.

7 And our response is what we're really focusing on here,
8 what the big focus is not these folks who have really strong
9 claims, it's people who don't have strong claims come here
10 anyway, are able to gain release into the United States and
11 then don't apply, abscond, all those things.

12 So it's this ultimately baseless asylum claim problem and,
13 again, people -- it's not just people show up, they lose, oh,
14 now we go -- now we have to leave. It's not even applying, not
15 even showing up, winning in very few cases. So I'd say those
16 are the key kind of this is what the agency was relying on.

17 On the procedural requirements, Your Honor, the point I'd
18 emphasize here is that the guidance at each step emphasizes
19 it's imbued with discretion. Even if somebody could be
20 returned to Mexico, they may not be. The officer at issue
21 could say, like, "Oh, you know, I don't think this is an
22 appropriate case."

23 True, there are mandatory things that need to be done, but
24 that's true in general statements of policy quite often. I
25 mean, this was the *Regents* case in the deferred action for

1 childhood arrivals. The Ninth Circuit said, "Look, the DACA
2 program has elements that are mandatory. You know, we're not
3 going to take applications after a certain time or renewals
4 after a certain time." There were also other deferred action
5 requirements about chronology, presence, lack of criminal
6 history, just kind of hard bars.

7 The presence of hard bars doesn't take this out of the
8 general statement of policy. This is a case -- this is a
9 situation that involves prospective applications or guidance
10 regarding the exercise of discretion.

11 So this is a general statement of policy. It's immaterial
12 that the agency had announced at one time, "Hey, we may do a
13 rule making on this." Ultimately what it decided to do -- and
14 not dissimilar from when Congress thinks about enacting a law,
15 it doesn't enact a law and the absence of the law doesn't
16 necessarily mean that the authority on the issue didn't exist.
17 For example, said, "Look, instead of doing a rule making, we're
18 going to give guidance on the exercise of discretion on this
19 1225(b)(2)(C) authority that Congress gave us more than 20
20 years ago, it's imbued with discretion, that we've done on a
21 case-by-case scale here and there; but given the strains on our
22 system, we want to do it a little -- we want to do it broadly,
23 more broadly." So I'd emphasize that.

24 A couple points, Your Honor. The point I would emphasize
25 is that the plaintiffs have really -- they've relied on

1 evidence and extra-record evidence pieces, but in their
2 transfer motion in particular -- again this is at page 2 and
3 3 -- they've said, "Look, this doesn't rely on the application
4 of the policy to particular -- the guidance to particular
5 folks. It's really a facial matter."

6 **THE COURT:** Their opposition to your transfer motion?

7 **MR. STEWART:** Correct, Your Honor.

8 At page 2 the plaintiff said, I'm going to try to quote
9 this directly (reading):

10 "Plaintiffs' claims do not arise from or depend on
11 the details of the policy's initial implementation in the
12 Southern District or any other border location. Rather,
13 plaintiffs challenge a national policy emanating from
14 Washington, D. C., as unlawful on its face."

15 As Your Honor knows, it's extraordinarily difficult to
16 succeed on a facial challenge. You can't invalidate something
17 on a facial ground if it has a plain legitimate -- plainly
18 legitimate sweep. Here, the guidance here is being applied, by
19 all indications, in a reasonable, modest way consistent with
20 discretion. Folks are showing up for their hearings. They're
21 not being ordered removed *in absentia*. Folks are getting
22 continuances. Many have counsel. People are filing asylum
23 applications. They can assert fear at different parts of the
24 process.

25 So that shows that this guidance has a plainly legitimate

1 sweep and that there's no basis for this Court to invalidate
2 the guidance on any sort of facial way, particularly given the
3 very limited startup -- limited current use of the policy.

4 **THE COURT:** What's the difference, if there is any, in
5 your mind between -- I know your basic argument is that there
6 should be no injunction in this case, but I assume you may have
7 a view on if there is injunctive relief, it should be limited
8 in certain ways and the like.

9 First of all, on the national scope of any injunctive
10 relief, I know you're saying, "Well, at the very least you
11 shouldn't issue an injunction that would be beyond the
12 plaintiffs in this case." How is that workable?

13 **MR. STEWART:** Sure, Your Honor. In this case, we
14 clearly have identifiable sets of plaintiffs. We have
15 individuals. This is not like the recent East Bay case where
16 it was -- you had what the Court saw as a problem because you
17 wouldn't even have people crossing the border or individuals
18 who faced the harmed claim -- the harm claim so all you have is
19 organizations.

20 Here you have folks that have identifiable injuries,
21 identifiable alleged injuries, and you can carve it in a
22 different way.

23 Also, you have here a policy --

24 **THE COURT:** There's no question, though, is there? I
25 mean, I think the answer is obvious, but I still want to hear

1 it from you. There is no suggestion that different procedures
2 are going to be implemented in different locales; i.e., this
3 San Ysidro port of entry is going to be in a different position
4 than Eagle Pass or wherever it gets rolled out to. It's all
5 going to be a national program, isn't it?

6 **MR. STEWART:** I believe at this stage, Your Honor, the
7 announced intent is to roll it out more broadly. I don't know
8 that there's a commitment yet to say we are going to do this
9 exactly this way. I mean, it could -- this is, again, an issue
10 imbued with discretion, and the Secretary could say, "Look, I
11 think we need to tweak this here because we have this challenge
12 at this border or this is, you know, different -- circumstances
13 could be different."

14 So I don't know that -- I don't think there's a commitment
15 to doing it definitively in the precise same way at different
16 places. We just don't know that yet, and we have a pretty
17 limited starting point here of -- I mean, the named plaintiffs
18 here are at one port of entry. So I don't -- I don't mean to
19 be difficult because I did -- I do know there's an intent to
20 expand it, and that's been announced; but I'd say that it's
21 possible that the guidance, you know, could evolve and there is
22 also this discretionary piece.

23 **THE COURT:** Well, I suppose -- I didn't see anything
24 in what is identified to me as the rollout, if you will, that
25 is contemplating any kind of tailored process based upon the

1 port of entry that someone comes through.

2 But, okay. Let me ask you while I'm on the question of
3 sort of just remedy and injunctive relief. If a decision were
4 to be rendered that wasn't, say, on the statutory
5 interpretation question, the first question, but was on the
6 *non-refoulement* aspect of the government's obligations and
7 whether or not there's a process by which that's being
8 implemented and let's assume for purposes of discussions I deem
9 it to be inadequate, is the remedy then a remand or is the
10 remedy just an injunction and you let the dust settle as it
11 settles?

12 I mean, what -- I know you don't want me to issue an
13 injunction; but if I issued an injunction, would you make some
14 argument that it should be limited in any fashion beyond the
15 national scope issue which we've already talked about?

16 **MR. STEWART:** Certainly, Your Honor. You're saying --

17 **THE COURT:** Let me rephrase it because it may be a
18 difficult question.

19 If the basis of a decision is that there are defects in
20 the process, more a procedural problem, as opposed to a
21 decision that it's violative of the statute and, therefore,
22 say, for example, the MPP program is inconsistent with
23 statutory interpretation and it's enjoined, that's one avenue
24 they're asking me to take.

25 They're also asking me to say the procedures that have

1 been implemented to address the *non-refoulement* issue are
2 simply defective, they're inadequate.

3 Those could theoretically be repaired. I mean, it's not
4 that the government may -- DHS may decide they want to do that,
5 but they theoretically could do that. So does that have any
6 impact on how the injunctive relief should be crafted with the
7 understanding you don't think any injunctive relief should be
8 crafted?

9 **MR. STEWART:** Understood, Your Honor.

10 I think, yes. I mean, I think *California versus Azar*, the
11 court's recent opinion, does emphasize the limited nature of
12 any injunctive relief. And if the Court were to find, "Look,
13 this is fine under Section 1226 but the issue is we need more
14 procedures," I think it would be an appropriate "Look, remand
15 to the agency; or, look, the agency, you can keep doing this
16 but you have to make sure that you hit these procedural marks."

17 It's not just stop things dead in its tracks, not to say
18 you can't do this at all, not to say -- and it would be, I
19 think, as limited geographically as possible. I do think the
20 courts of Texas, for example, if it were to happen there, are
21 equally able to address any concerns.

22 But I would say the agency should be able to continue to
23 do this so long as it satisfies whatever procedures; for
24 example, if Your Honor would say procedures are required. I
25 think that's -- I think that's right, or I think that would

1 be -- I'll put it this way, I think if that's --

2 **THE COURT:** I understand.

3 **MR. STEWART:** Yeah.

4 **THE COURT:** Okay.

5 **MR. STEWART:** Your Honor, one request I would make is
6 that if the Court were to issue any kind of injunctive relief
7 or anything like that at all, I would like to request a stay of
8 that so that -- a stay pending appeal so the government could
9 consider this. This is a very important initiative. The
10 Executive Branch is responding to a very, very difficult
11 problem.

12 Obviously this is -- as before, it's an area that I don't
13 think the Court needs to get to; but if there were any kind of
14 relief issued against the guidance here, we would respectfully
15 ask for a stay pending appeal so that we could seek relief.

16 **THE COURT:** Should there be, though, a decision that
17 there's either defective process or there's inconsistent with
18 the statutory scheme, what would be the justification for
19 allowing the process to continue?

20 I mean, I could see a distinction, perhaps, in requiring a
21 return of individuals who've already been processed. Well, I
22 hear your request --

23 **MR. STEWART:** Right.

24 **THE COURT:** -- and I'll think it through.

25 **MR. STEWART:** I appreciate that, Your Honor. I just

1 wanted to make sure I got it out --

2 **THE COURT:** Okay.

3 **MR. STEWART:** -- because, of course, we can't predict
4 but we wanted to have that there.

5 **THE COURT:** All right. All right.

6 Okay. Well, why don't we take a break, and then I'll come
7 back and we can have some further discussion, and we'll go from
8 there.

9 So let's start at 11:15.

10 (Recess taken at 11:01 a.m.)

11 (Proceedings resumed at 11:17 a.m.)

12 **THE COURT:** Very well. Ms. Rabinovitz, if you want
13 to -- anything further you would like to discuss?

14 **MS. RABINOVITZ:** Yeah. Just four points, Your Honor.

15 One is on the statute. I think that the government still
16 hasn't -- there's no clarity as to what this provision does.
17 There is an exception in the statute for people to whom this
18 applies.

19 It seemed like the government was hedging about whether
20 this applies to somebody, for example, who is put into
21 expedited removal and passes a credible fear. And if -- I
22 guess I would like to understand what the government's position
23 is on that because if they're taking the position that it could
24 be applied, then the notion that someone would have to go
25 through the credible fear but could still be returned to

1 contiguous territory would seem to undermine --

2 **THE COURT:** Walk through with me again what you
3 think -- your understanding of what they're saying and why that
4 causes you concern. They're saying -- well, go ahead. I'm not
5 sure I understand this.

6 **MS. RABINOVITZ:** I think there's not clarity. Right
7 now they are not applying -- my understanding is they've
8 decided not to apply MPP to anyone who's been processed for
9 expedited removal, but I don't know if they read the statute
10 as --

11 **THE COURT:** Precluding that?

12 **MS. RABINOVITZ:** -- as precluding that; or if their
13 position is once you're in 240 removal proceedings, you are
14 then under 235(b)(2) so you could be subject to contiguous
15 territory return, and that seems completely wrong.

16 I mean, the whole purpose here was Congress wanted to
17 protect these people, you know, with the credible fear
18 screening. It doesn't seem like that to then subject them to
19 contiguous territory return -- it's a big deal to go back to
20 Mexico.

21 **THE COURT:** Okay. Well, Mr. Stewart, do you want to
22 comment on what the government's -- how it works from the
23 government's perspective?

24 **MR. STEWART:** Your Honor, as I explained before, I
25 don't want to foreclose that possibility as to it being applied

1 in the future. My pitch is that Ms. Rabinovitz should find an
2 actual plaintiff that faces that situation. Then the issue
3 could be joined at that time.

4 What I can say for now is that MPP as currently issued
5 does not have a situation where somebody goes through credible
6 fear and then ends up in Section 240 removal proceedings and
7 then is subjected to (b) (2) (C).

8 I would say that I don't understand her suggestion that
9 that would be somehow irrational if the point of -- the point
10 of putting people in full removal proceedings in a return
11 category, that would make sense if somebody's now in a very
12 long process that will take a very long period of time.

13 But, again, I don't want to join issue any farther than
14 that because we do not have that circumstance.

15 **THE COURT:** So the concern you're talking about is
16 someone has that initial -- expresses a fear, has the initial
17 interview with the asylum officer, immigration officer, and the
18 conclusion is they have articulated a credible fear. Then they
19 go into ordinary removal proceedings, and then they get
20 subjected to the contiguous removal provision.

21 So you're postulating a person who has passed the
22 threshold of establishing a credible fear and, nonetheless,
23 gets removed -- gets returned, to use the government's term,
24 back to Mexico?

25 **MS. RABINOVITZ:** Yes.

1 **THE COURT:** All right. And you're saying that
2 certainly didn't happen with respect to these 11?

3 **MS. RABINOVITZ:** It could.

4 **MR. STEWART:** The issue hasn't been joined,
5 Your Honor; but, again, I don't see the illogic of that because
6 the whole purpose of going through ex pat removal proceedings
7 stating a credible fear is to get into full removal
8 proceedings. That's the hope.

9 **THE COURT:** Well, but if you -- well, isn't that
10 mixing -- I mean, the credible fear issue is about your concern
11 about being returned to Mexico; right? It's not the -- and so
12 if -- the assumption in the question by Ms. Rabinovitz is
13 assume a migrant who has shown credible fear. The
14 determination is, yeah, that you've passed that threshold. And
15 then -- so they're in a removal proceeding, and then they're
16 subjected to going back through the contiguous return policy.

17 And there is an inconsistency, I suppose, I hear her
18 saying, between passing the threshold on credible fear and then
19 finding yourself in normal removal proceedings and being
20 returned to Mexico.

21 **MR. STEWART:** I think I see the issue, Your Honor.
22 Credible fear is not about -- for Northern Triangle nationals,
23 it's not about Mexico. It's about Guatemala. You know --

24 **MS. RABINOVITZ:** But it could be. Mexicans could be
25 subject to this as well.

1 **MR. STEWART:** They are not subject to this at this
2 time. The issue is not joined and, again, this is a facial
3 challenge.

4 **THE COURT:** Wait a minute. Okay.

5 So the credible fear -- so I want to keep my categories
6 separate. The credible fear discussion is at that initial
7 interview. I thought that there was -- the triggering event
8 for the credible fear discussion is if a migrant says --
9 volunteers, "I'm concerned that I'm going to be subject to
10 torture and mistreatment if you send me back to Mexico."

11 **MS. RABINOVITZ:** No.

12 **THE COURT:** All right.

13 **MS. RABINOVITZ:** Let me explain. The credible fear
14 process is part of expedited removal. Expedited removal was
15 intended by Congress to just --

16 **THE COURT:** Yes.

17 **MS. RABINOVITZ:** -- it's separate from the MPP,
18 separate from contiguous territory return.

19 **THE COURT:** Right. Understood.

20 **MS. RABINOVITZ:** And it just was concerned -- it was
21 against a backdrop that people are here pursuing their cases
22 and they're going to be returned without a hearing unless they
23 pass a credible fear of showing that they have a significant
24 possibility of facing persecution or torture in their home
25 country.

1 **THE COURT:** Yes.

2 **MS. RABINOVITZ:** Then if they do, now they're given a
3 regular 240 removal proceeding, and this could be Mexicans. It
4 could be -- and, in fact, at the time --

5 **THE COURT:** Yes, well, but putting those aside --

6 **MS. RABINOVITZ:** Right. But --

7 **THE COURT:** -- and Mr. Stewart is saying, "Well, we're
8 not applying that to that group of migrants," isn't he right
9 that there's nothing inconsistent with if you establish a
10 credible fear about your return to one of the Northern Triangle
11 countries, that doesn't by definition mean you can't be subject
12 to the contiguous removal process?

13 **MS. RABINOVITZ:** It doesn't mean by definition, but I
14 think that there's a few things here.

15 First of all, when Congress enacted this in 1996, the
16 majority of the people who were subject to expedited removal
17 were Mexicans. It's changed. The migration patterns have
18 changed and now it's Central Americans. So I do think it's
19 relevant to think of who you're thinking about because -- and
20 because in theory the way that -- we're looking at how the
21 statute can be construed, and it can be applied to Mexicans and
22 that was the large group of people that they thought it would
23 be applied to.

24 So what you're saying --

25 **THE COURT:** Isn't Mr. Stewart right, though, that that

1 case has to wait for those individuals?

2 **MS. RABINOVITZ:** No, because we're talking about the
3 statute and what it means. And what I'm trying to understand
4 is what does this -- what does the -- Congress made an
5 exemption for people to whom paragraph (1) applies. It seems
6 to us that that was in recognition that these are asylum
7 seekers, they're vulnerable, and we're making sure that they're
8 not returned, you know, by having a credible fear thing; and
9 we're not going to return them to Mexico, you know, if they're
10 afraid. Just we're not going to subject them to that.

11 It's true, it's not --

12 **THE COURT:** Afraid of Mexico or afraid of what?

13 **MS. RABINOVITZ:** Well, you could -- I mean, afraid of
14 persecution or torture in Mexico, which can also include, which
15 is a big issue right now, that from Mexico, they'll be sent
16 back to their home country. So that's all part and parcel.

17 But there's no question -- there's two issues. There's no
18 question that this subjects to Mexico. So you have to make
19 sure that you read the statute in a way that Mexicans -- it
20 would make sense as applied to Mexicans.

21 Secondly, there's no question that Central Americans also
22 have fears of persecution and torture in Mexico, and all of our
23 named plaintiffs are that. I mean, to say that our named
24 plaintiffs don't have strong claims, you know, of fear in
25 Mexico is just not true.

1 **THE COURT:** No, I know. And the declarations you
2 provided that go to the irreparable harm issue certainly make
3 note of the fact of some of the concerns that they have about
4 Mexico.

5 **MS. RABINOVITZ:** So what I'm concerned about is if the
6 government is not ready to disclaim -- and I understand they
7 say it's not before you, but we're trying to understand what
8 this statute means; and the government doesn't disclaim that
9 the statute could mean that they could still -- that to say to
10 whom this applies doesn't mean someone to whom they've applied
11 expedited removal and given them a credible fear. Now that
12 they're in 240 removal proceedings, the government is saying
13 they're not going to give up the possibility that the exemption
14 doesn't apply to them.

15 And then my question is: Who does the exemption apply to?
16 Why did Congress even put this in? If the exemption only
17 applies to individuals who are expeditedly removed, they're not
18 in 240 proceedings. Why would there even need to be an
19 exemption there?

20 So the exemption means something beyond that, and I don't
21 understand, you know, why the government -- I mean, what the
22 government's position is.

23 And it also goes to the question of trying to say, well,
24 how long are these proceedings going to take and maybe it made
25 sense that Congress thought people, you know, who were in 240

1 removal proceedings would be longer; but people who pass a
2 credible fear in 240 removal proceedings, that's going to take
3 awhile also. Yet, we think clearly Congress didn't think that
4 after they've passed a credible fear and they're in their 240
5 removal proceedings, they should be returned to a contiguous
6 territory, which could be their own home country, you know,
7 without any kind of protection at all. It just doesn't make
8 sense.

9 I mean, I think that return to Mexico obviously is clear
10 for somebody who's fleeing Mexico and seeking persecution, but
11 it's also a big deal for the Central Americans because there's
12 plenty of evidence out there that's in the administrative
13 record -- you don't need our evidence -- that it's dangerous
14 there. It's dangerous for migrants, and one of the dangers is
15 that they can be sent back to their home countries.

16 So I guess all that I want to say is that this -- we need
17 to understand why Congress would have exempted them from
18 contiguous country return.

19 **THE COURT:** Okay. That was -- I think you said you
20 had four. That was one.

21 **MS. RABINOVITZ:** That was one. And I just --

22 **THE COURT:** Any more on one, this point that
23 Ms. Rabinovitz has just gone over, that you want to say?

24 **MR. STEWART:** Just two very quick points, Your Honor.
25 The first is that if we're getting into a situation where this

1 statute could -- that there could be guidance that could be
2 applied in a certain way that is inconsistent with the statute,
3 it's tantamount to a confession that there is no basis for
4 merit success for the plaintiffs here. That's point one.

5 And point two is, Your Honor asked, and my friend just
6 highlighted: Why would Congress do this? Why would Congress
7 allow return to Mexico? And I'm glad that my friend brought up
8 the feature that Section 240 proceedings do take time. They
9 take awhile. There's review with the federal courts of
10 appeals. It could take years.

11 If Congress really believed that people who would be
12 subject to (b) (2) (C) would get full-on IJ, BIA, Court of
13 Appeals review, then it really didn't believe in return to
14 territory. It's imputing an absurd motive to Congress that
15 return to territory would be completely ineffectual because it
16 would be years before somebody could be returned to territory
17 when they've exhausted all of their claims.

18 So getting to the sense of why the difference between
19 return and removal, that's a big piece of it, Your Honor.
20 Withholding a removal comes only after you have a final removal
21 order and you can go up through the PFR process.

22 So this does explain -- this is a logic behind why return
23 to a contiguous territory is different from removal to, say, a
24 Northern Triangle country.

25 **THE COURT:** Okay.

1 **MS. RABINOVITZ:** Well, since counsel has moved on to
2 the whole question of would the contiguous territory provision
3 be meaningless if there were actually real protections, there
4 are people who, you know, live in Mexico, who, you know, would
5 go back to Mexico. We're talking about involuntary return of
6 people who fear persecution, and that's whom the provision --
7 now that they're moving on to withholding, that's who -- and
8 *non-refoulement*, that's who the provision needs to protect.

9 And for the government to claim --

10 **THE COURT:** Well, as I understood your argument
11 before, it was you're not taking the position that the only
12 proper procedure is to implement the entire 1231 structure.
13 You're just saying the current procedures, such as they are,
14 are deficient and they've got to come back with new
15 procedures --

16 **MS. RABINOVITZ:** Correct.

17 **THE COURT:** -- but they don't necessarily have to be
18 the full panoply -- maybe they do from your perspective; but
19 you're not suggesting that the only thing, the only legal way
20 they could proceed is to apply the entire panoply of 1231
21 procedures.

22 **MS. RABINOVITZ:** That's true, Your Honor, but I think
23 that it needs to be a very rigorous process. I think that
24 we're talking about -- I mean, I could --

25 **THE COURT:** Where do I go to find the legal support

1 for the proposition, which I may well agree with just from a
2 policy perspective, that there ought to be those? What do I
3 look for?

4 **MS. RABINOVITZ:** One thing might be to look at the
5 kind of process that they implemented in two other contexts,
6 which was reinstatement of removal and administrative removal,
7 which were both contexts where -- different than ours right now
8 because they were situations where Congress singled out a
9 certain population of people and said, "You guys don't get
10 anything. We're not going to give you any kind of, you know,
11 relief at all. You're prohibited from any relief."

12 And notwithstanding that, they implemented regs that
13 required a reasonable fear interview and procedures that are so
14 far more protective than what they have here.

15 Now, we think --

16 **THE COURT:** Well, even if I form the judgment that
17 that's a better way to proceed, why are they legally required
18 to do that?

19 **MS. RABINOVITZ:** Well, they did that because they said
20 they were doing it in order to comply with the withholding
21 obligation -- the *non-refoulement* obligation under withholding
22 and CAT.

23 And what I want to point out is that those are -- I think
24 that this is a situation that needs to be more protective. In
25 both of those contexts -- in reinstatement of removal, you had

1 somebody who had already been ordered removed, had already had
2 an opportunity to sort of build a case, and had come back
3 illegally. In administrative removal, you had a group of
4 people that Congress is singling out because they had serious
5 crimes.

6 Here we have a population that is no different than the
7 population who's supposed to be able to get a full withholding
8 hearing. So I think that there is actually an argument that
9 those people should get a full withholding hearing before they
10 can be returned. I mean, you know, I don't see what's the
11 argument for making it -- for distinguishing them.

12 And there will be people who will say, "I'm not afraid.
13 Send me back to Mexico. I'd rather do that." So it's not like
14 you're leaving them out.

15 And, in fact, you know, it's not so clear what -- you
16 know, in terms of, you know, when Congress enacted this
17 provision, it seems that it may have just been ratifying a
18 situation where it was a situation where people who had
19 commuter visas from Mexico, they'd just as soon wait in Mexico.
20 I mean, it's not like there's much evidence that this was
21 intended in some other way, this provision.

22 And it says that the provision allows for return
23 consistent with discretion. Well, discretion has to be
24 operated in a way that's consistent with our obligations.

25 And so all that I'm suggesting is, in terms of what the

1 procedure should be, it has to be a rigorous procedure. If you
2 want to look at other procedures, we see what's required for
3 people who are in regular removal proceedings. There's no
4 basis for distinguishing these individuals. Then you see
5 what's required in streamlined removal proceedings where those
6 individuals were targeted -- designated as people who Congress
7 specifically didn't want to give the same protections to.
8 They're getting way more protections.

9 But I'm saying even the protections there I think are more
10 restrictive than what we think are required here. And I would
11 say it would be something more like what's an expedited removal
12 where people just have to make out a credible fear claim and
13 where they have to be asked about whether they have a fear
14 because you need something really protective. I mean, this is
15 a big deal sending people back to a country where they could
16 be, you know, tortured or persecuted.

17 And so that's my point on that.

18 **THE COURT:** Okay.

19 **MS. RABINOVITZ:** The third point I wanted to make is
20 just on the arbitrary and capricious. Counsel for the
21 government said, "Well, even if the *in absentia* rate was
22 87 percent instead of what the government said, that would
23 still be a reason for doing it." But that's not the evidence
24 that Congress -- that the agency based it on. It's arbitrary
25 and capricious for them to -- we can't know what they would

1 have done if they had that evidence in front of them.

2 I mean, they based it on evidence, from what we can tell,
3 that was based on a much more heightened *in absentia* rate; and
4 it's arbitrary and capricious if it's based on faulty data,
5 whether it was that they misunderstood the data or
6 misrepresented the data. Maybe they would make the same
7 decision. Maybe they wouldn't. That's not for us to decide.
8 That's for them to go back and consider it with the correct
9 data.

10 The same thing in terms of the notion that there's
11 these -- that it was based on assumptions of the high-fraud --
12 you know, high asylum fraud. I just want to make the point
13 that not only did they -- was their data completely wrong that
14 9 out of 10 cases are denied, but even if -- and ours was that
15 maybe 25 percent, you know, or 75 percent were denied, so still
16 a large number, but we don't think that that's even an accurate
17 reflection of whether an asylum application is fraudulent.

18 **THE COURT:** But when we're going down that path, I
19 have -- this goes back to the analysis I'm supposed to apply --
20 I have an administrative record. There are materials in the
21 administrative record. You think "These aren't very good. We
22 have much better statistics than they've got. Their statistics
23 are deficient in various and sundry ways," but how can I get
24 there?

25 **MS. RABINOVITZ:** Well, this is where their own data,

1 if you look at their own data or -- our declaration, even if
2 it's excluded, is based all on government data.

3 **THE COURT:** Well, but that --

4 **MS. RABINOVITZ:** And so --

5 **THE COURT:** I mean, the fact that it's based on
6 government data, still it's extra-record information. And, you
7 know, I think what is pretty clear, and a concern that I think
8 is a legitimate one, is courts have -- you know, we take a look
9 at the administrative record in an APA claim and we have
10 certain exemptions that get us out from confined to that
11 administrative record; but unless you apply those, we look at
12 the record.

13 And it isn't a question of whether or not I think somebody
14 can come up with better statistics that are going to convince
15 me that they -- if I was in that decision-maker's position, I
16 would go another way. That's not how I'm supposed to look at
17 it.

18 **MS. RABINOVITZ:** Right, but we're not talking about
19 better statistics. We're talking about government statistics,
20 statistics they relied on that they -- and statistics that they
21 chose not to rely on but that are government statistics. We're
22 not making up new statistics. And the expert declaration that
23 we included, which you don't have to include --

24 **THE COURT:** Let me give you an example. If the
25 administrative record contains within it some assessment that

1 87 percent of the people who are released they abscond and they
2 don't come back, and that's in the record and you think, "Well,
3 if we can get outside the record, I can show that that is
4 just -- that's wrong, they've got a bum calculation there," why
5 should I go down that path?

6 I mean, it really is a question of do they have -- do they
7 point to something that justifies their decision or not; and if
8 they do, then isn't it -- I'm not supposed to second-guess
9 their decisions.

10 **MS. RABINOVITZ:** Right, but the government isn't
11 allowed to bury its head in the sand. I mean, it can't just
12 say "We're looking to look at this data" -- and this is why
13 this may be something that comes farther down the road, but
14 they can't just say "We're going to look at this data and not
15 look at this data and we're going to misinterpret this data."

16 **THE COURT:** Right.

17 **MS. RABINOVITZ:** Because, like, for example, the
18 absconsion --

19 **THE COURT:** That's, then, when you're making the
20 argument that this is the reason you go outside the record.

21 **MS. RABINOVITZ:** Well --

22 **THE COURT:** That whole line of analysis you've just
23 given I would interpret as this is the reason you're not going
24 to be confined to the administrative record. That's different.

25 But you're trying to walk a fine line. You're saying, "We

1 are willing to live with the administrative record for this
2 motion right now" --

3 **MS. RABINOVITZ:** Right.

4 **THE COURT:** -- "but we're willing to live with the
5 record but, Judge, let's go -- let's really look and see
6 whether or not this is" -- I'm not sure you can have it both
7 ways.

8 I mean, if you're agreeing for the reasons that you're
9 strategically agreeing to it, and I'm not questioning it, that
10 the confines of the record are what I look at, if they
11 articulate a reason that they are relying on and that is an
12 otherwise -- you know, I may not agree with it, but it's a
13 reason, then I'm not sure how far I can go.

14 **MS. RABINOVITZ:** But is it a reason if statistics are
15 analyzed in a way that doesn't make sense? For example, if you
16 analyze absconsion rates based on, you know, completion data
17 that is just for one year and so it doesn't take into account
18 all of the cases that are pending, then that absconsion rate is
19 going to be a lot higher, just like the denial rate is going to
20 be a lot higher. That's not an accurate rate. You know,
21 that's just from their own data how they're analyzing it.

22 So I'm not saying look at other data. I mean, I think
23 there is other government data which could be judicially
24 noticeable; but if you're not ready to go there, then, you
25 know, even just on this data, the conclusions that they draw

1 from it aren't accurate.

2 **THE COURT:** Okay.

3 **MS. RABINOVITZ:** And, anyway, the next point was just
4 going to be that, you know, I'm not really -- I'm not really
5 sure about -- we're not challenging -- counsel's argument about
6 facial challenge as applied, I mean, we're not challenging how
7 this is being applied. We're challenging this policy as it
8 exists. As it exists --

9 **THE COURT:** Which is a facial challenge.

10 **MS. RABINOVITZ:** Okay. So as it exists, it's not
11 reasonable. This has nothing to do with saying, "Oh, they're
12 not doing this right. They're not doing this right." It's not
13 reasonable. This fear mechanism they have is completely
14 unreasonable, and for him to say, oh, they're not giving people
15 *in absentia* orders right now, well, in fact, the government was
16 asking for *in absentia* orders at the recent hearings.

17 So I just feel like even though that's not what's at issue
18 here, I feel like there's a little bit of having it both ways
19 saying "This is facial but, on the other hand, we're not doing
20 this. We haven't done this wrong." Well, I think it's both.
21 The policy on its face is wrong. It's illegal. It's
22 unreasonable.

23 And also they are -- to say that this is limited, they've
24 made clear that they want to do this in as broad a way as they
25 can. And so I don't -- there's no way to limit the injunction,

1 and that comes to the next question about injunction versus
2 remand, which I said before I'm not really quite clear what --
3 who the remand is to or for what purpose.

4 Our main concern is that if the agency action is
5 violative, it needs to be vacated, enjoined. They can't keep
6 on carrying out this policy. If they want to go back and come
7 up with a policy that's not, you know, arbitrary and
8 capricious, that doesn't violate the statute, fine, then we can
9 look at that.

10 But it can't be, like, "Oh, just fix this and fix this and
11 fix this." The injunction shouldn't be limited that way. I
12 mean, the thing is this policy is unlawful. Yes, they can come
13 back and try to fix it. They can come back and try to do
14 notice and comment, which we think is required. You know, they
15 can consider the factors that they should have but, you know,
16 it has to be enjoined.

17 **THE COURT:** How about the stay notion?

18 **MS. RABINOVITZ:** Well, I mean, if it's illegal and
19 it's hurting people, then there's no reason for a stay. I
20 mean, the stay would defeat the purpose.

21 **THE COURT:** Well, would it be so simple?

22 You know, the stay analysis is really the question of if
23 there's a significant policy involved and in order -- while
24 plainly whatever is decided here is going to be subject to
25 review, the one thing that is certain is one side or the other

1 will go to the next step.

2 And it's just a question of kind of akin to the equitable
3 analysis I have to undertake in terms of injunctive relief.
4 You know, if you make a determination to stop a substantial
5 policy, in the interim while it's under consideration, what
6 should happen?

7 **MS. RABINOVITZ:** Well, the thing here is -- the thing
8 here is this policy hasn't been in effect very long. They've
9 been doing it, as they said, in a limited way. You know,
10 they've described it as an unprecedented policy.

11 We're not asking for a major change. We're saying just go
12 back to where we were on January 28th and enjoin it.
13 Especially since we know that they're just looking for the go
14 ahead to be able to expand it more, why allow it to be expanded
15 more, you know, when we think it's illegal?

16 But if the stay issue comes up, we'd like an opportunity
17 to brief it obviously, you know, because we have reasons for
18 opposing it.

19 **THE COURT:** Okay. Mr. Stewart?

20 **MR. STEWART:** Just a couple points, Your Honor.

21 I notice that my friend emphasized the facial nature of
22 the challenge. If the challenge is facial, then it certainly
23 fails, and it clearly is facial. On page 1 of the
24 administrative record it says the following (reading):

25 "Aliens in the following categories are not amenable

1 to MPP."

2 Several bullets down (reading):

3 "Any alien who is more likely than not to face
4 persecution or torture in Mexico."

5 Lower on that page it says (reading):

6 "If an alien who is potentially amenable to MPP
7 affirmatively states that he or she has a fear of
8 persecution or torture in Mexico or a fear of return to
9 Mexico, whether before or after they are processed for MPP
10 or other disposition, that alien will be referred to a
11 USCIS asylum officer for screening following the
12 affirmative statement of fear of persecution."

13 I'll stop reading there, Your Honor.

14 But then on pages 2273 to '74, USCIS relates this is the
15 process. It's going to be a nonadversarial interview. We're
16 going to make sure that the alien understands that he could be
17 subject to -- he or she could be subject to return in Mexico.
18 We're going to account for credibility, commitments from the
19 government of Mexico, possibilities about what region the alien
20 may be able to go to. And even if somebody's amenable to
21 return through MPP, they still may not be in the exercise of
22 discretion.

23 On its face, that is a legally valid policy that
24 transgresses no legal rule on withholding even if it applied.

25 **THE COURT:** Well, I mean, I understand that's your

1 argument, but I guess I don't understand why you think it being
2 a facial challenge gets you out from under.

3 Those pronouncements are made in there. The argument that
4 the plaintiffs are making is that's deficient in terms of our
5 obligations under the *non-refoulement* issues, and that on its
6 face that's not good enough because it doesn't provide for
7 various protections that, for example, you'd find those in the
8 1231 removal process where there is fear of return.

9 So I hear you saying on its face those are sufficient, but
10 I don't understand when you say "But because it's a facial
11 challenge, it can't succeed." That assumes, I think, that
12 those provisions are sufficient and pass muster.

13 **MR. STEWART:** Your Honor, the attack here is -- the
14 legal rule that my friend is invoking is --

15 **THE COURT:** In other words, let me make clear what my
16 question is.

17 **MR. STEWART:** Yes, Your Honor.

18 **THE COURT:** You're sort of suggesting when you say if
19 it's an as-applied -- it's a facial challenge, it can't
20 succeed, sort of suggesting, well, if they had evidence that it
21 was -- none of the protections that are being addressed there
22 are actually being implemented, that would be an as-applied
23 challenge, and that's not what they're making. I understand
24 that distinction.

25 But they're also saying that those are not sufficient as

1 they are set forth. It's not that "Well, those are lovely but
2 they're not actually doing them." They're saying "Those aren't
3 sufficient on its face."

4 So I understand you say they're wrong, but that's a
5 perfectly appropriate as-applied challenge, isn't it -- I mean,
6 facial challenge, isn't it?

7 **MR. STEWART:** Two responses, Your Honor. The first is
8 that part of that does back into whether those procedures
9 apply. I'll put that aside for now.

10 The second one --

11 **THE COURT:** Because that's your return argument;
12 right?

13 **MR. STEWART:** Yes, Your Honor.

14 **THE COURT:** Right.

15 **MR. STEWART:** The second one and this goes to the
16 legal prohibition at issue is returning somebody or removing
17 somebody to a country where they're more likely than not to
18 face persecution or torture. It's -- and on its face, the
19 fact -- the guidance here has a plainly legitimate sweep of
20 protecting aliens from that prospect. If it doesn't work in
21 particular cases, that's the stuff of an as-applied challenge.

22 **THE COURT:** But you would agree with me that if the
23 administrative record, the policy document, says "We really --
24 our whole plan is to make sure that nobody is subjected to
25 torture and any kind of awful thing that is -- we want to avoid

1 under *non-refoulement* policies," and then there were no
2 procedures, I mean, the fact that you pronounce that you don't
3 want that to happen is not good enough.

4 I mean, it's fine that it says, "You know, we want to make
5 sure that people are not put in harm's way consistent with our
6 *non-refoulement* obligations"; but if there are no procedures to
7 ensure that, the fact that you've said it doesn't do anything
8 for you, does it?

9 **MR. STEWART:** Your Honor, again, I don't think we have
10 that here. We have --

11 **THE COURT:** Oh, I understand.

12 **MR. STEWART:** Right. I mean, we have plenty of
13 indication here that there are procedures that gets it just
14 what could be required and just what the concern is here, and
15 that satisfies the facial challenge.

16 **THE COURT:** Yeah, but that's a different point than
17 saying, "Well, because there's some language in there in the
18 MPP that says, 'Well, the MPP is not inconsistent with our
19 obligations under the *non-refoulement* principles because we
20 want to avoid having any people subject to that.'" That by
21 itself is not enough. So what?

22 **MR. STEWART:** I'm not necessarily sure about that,
23 Your Honor. I mean, again, it would back into some of those
24 arguments, but I'm not necessarily --

25 **THE COURT:** If you mouth the words that you want to

1 conform to the obligations of the government but you do nothing
2 to suggest that it's actually going to happen, that's enough?

3 **MR. STEWART:** Your Honor, I think in an individual
4 case-by-case discretionary case there doesn't need to be an
5 announcement necessarily of, you know, we're going to make --
6 if the obligation is satisfied, it's satisfied. There
7 doesn't -- that could end it.

8 On remedy, Your Honor -- I'm sorry, Your Honor.

9 (Pause in proceedings.)

10 **MR. STEWART:** And in all events, Your Honor, again, we
11 do have guidance here. I don't want to, you know, back away
12 from that. There is a lot to say, "Look, you know, we're going
13 to go through these steps." So you don't have to get into that
14 case mouthing the words or that kind of a thing. I just want
15 to be careful on that.

16 **THE COURT:** I understand.

17 **MR. STEWART:** On the remedy point, Your Honor, and
18 this may be the last matter I mention, your colloquy with my
19 friend kind of got her into a path where she was throwing out
20 different possibilities, different procedures, and they were --
21 they're just completely made up. They're not something that's
22 embodied in a statute the way you have -- or a regulation the
23 way you deal with reinstated removal orders.

24 And the remedy here, the maximum remedy would be a remand
25 without vacatur, again imposing any remedy, but it would be a

1 situation where you don't vacate the rule. You don't declare
2 this invalid. You don't prospectively enjoin any possible
3 guidance like the one suggested as my friend has asked the
4 Court.

5 But you remand and say, "Okay, Government, this can be
6 done lawfully if you just do this and then the policy or the
7 guidance can continue to be employed as soon as any issue is
8 addressed." So remand without vacated would be the remedy if
9 the Court were to get that far.

10 Thank you, Your Honor.

11 **THE COURT:** I mean, this is where, to some extent, it
12 turns on -- it's hard for counsel to talk about in the abstract
13 because I haven't yet decided, number one, how I'm going to
14 rule; and then if I do think an injunction is appropriate, what
15 the triggering basis for that is. Because a vacatur, for
16 example, may be certainly warranted if the decision is that
17 statutorily 1225, all those arguments that plaintiffs have
18 presented, shows that this is contrary to law, then you vacate
19 it.

20 If the decision is the process is lacking and there needs
21 to be process on the *non-refoulement* issues, are you really
22 vacating the order, vacating the MPP, or are you saying you've
23 got to change the MPP? So it's not necessarily vacating it, is
24 it, in that instance?

25 **MS. RABINOVITZ:** Well, I think to the extent that it

1 violates the APA, this policy -- because the policy part and
2 parcel of it is this -- that there is this fear mechanism --

3 **THE COURT:** Yes.

4 **MS. RABINOVITZ:** -- if it violates the APA, then the
5 default remedy is vacatur. That doesn't prevent them from
6 going back and coming up with another policy.

7 **THE COURT:** I see.

8 **MS. RABINOVITZ:** But in the meantime, it's vacated and
9 they can't do it; and that's what our main concern is, that
10 they not be implementing this and that they shouldn't be
11 implementing it in between while they try to tweak this or that
12 because this is a major tweak they have to do. This is not
13 some little thing.

14 I mean, the procedure -- the process they have right now
15 is -- completely turns the whole notion of protection on its
16 head to be -- and I don't know why they would have come up with
17 this kind of process. I don't want to, you know, impute bad
18 motives, but nobody can pass the screening and there's no
19 basis.

20 You know, when you look at what they've implemented in
21 other contexts, it's a huge departure. They haven't even
22 acknowledged that we've used different kind of procedures in
23 other contexts and that this is a departure. That's the
24 essence of what's arbitrary and capricious. So it just is --
25 it --

1 **THE COURT:** Well, changing a policy is not by
2 definition arbitrary and capricious.

3 **MS. RABINOVITZ:** No, if they acknowledge it and
4 explain it, but they don't even acknowledge it. At least in
5 terms of the administrative record they've given to us, we
6 don't see anything that acknowledges, "Oh, we make fear
7 determinations differently in this context, and you could do a
8 credible fear or you could do a reasonable fear or you could
9 have -- you could give IJ review instead of no IJ review."

10 I mean, this process says they don't even guarantee you an
11 interpreter. They don't guarantee you an opportunity to
12 consult with counsel. They don't guarantee you an interpreter.
13 It's just this on-the-spot determination by an asylum officer.
14 No review by an IJ. You have to meet the absolute -- you know,
15 the ultimate showing of more likely than not, which is the
16 showing that's only required when you get a full-blown
17 adversarial hearing. It's just where did this come from?

18 **THE COURT:** Okay. Any final comments, Mr. Stewart?

19 **MR. STEWART:** I'd just say the government doesn't need
20 to acknowledge departure from a statute that doesn't apply,
21 Your Honor. I think we've explained other points on that in
22 our briefing; and with that, I'd be happy to point to our
23 briefs and other points made today at argument.

24 Thank you, Your Honor.

25 **THE COURT:** Okay. Anything further?

1 **MS. RABINOVITZ:** No. Thank you, Your Honor.

2 **THE COURT:** Thank you very much for a very interesting
3 and helpful argument, and I will take the matter under
4 submission.

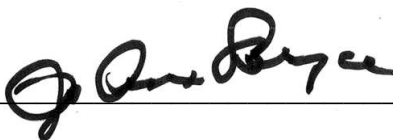
5 (Proceedings adjourned at 11:55 a.m.)

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9 **CERTIFICATE OF REPORTER**

10 I certify that the foregoing is a correct transcript
11 from the record of proceedings in the above-entitled matter.

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13 DATE: Wednesday, March 27, 2019

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18 _____
19 Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
20 U.S. Court Reporter
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